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In the Supreme Court of the United States

BORDEN RANCH PARTNERSHIP AND
ANGELO K. TSAKOPOULOS, PETITIONERS

v.

UNITED STATES ARMY CORPS OF ENGINEERS AND
ENVIRONMENTAL PROTECTION AGENCY

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

Section 404 of the Federal Water Pollution Control Act (Clean Water Act) regulates the discharge of dredged or fill material into waters of the United States. 33 U.S.C. 1344. Section 404(f) exempts from regulation the discharge of dredged or fill material from "normal farming, silviculture, and ranching activities," but excepts from that exemption any discharge that is "incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced." 33 U.S.C. 1344(f). In this case, petitioners engaged in "deep ripping," which involves using bulldozers to pull long metal shanks through the ground, to convert grazing lands into lands suitable for cultivating deep-rooted crops. In the process, petitioners filled two acres of wetlands, which were indisputably waters of the United States, with dirt, rock, sand, and biological matter. The questions presented are:

1. Whether petitioners' deep ripping resulted in discharges of pollutants subject to regulation under Section 404.

2. Whether petitioners' deep ripping qualified for the conditional exemption from regulation under Section 404(f).

3. Whether each violation of the Clean Water Act should be counted in determining the maximum civil penalty if several violations occurred on a single day.

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BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-22) is reported at 261 F.3d 810. The district court's amended order on cross-motions for summary judgment (Pet. App. 28-56) and its findings of fact and conclusions of law (Pet. App. 67-121) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 15, 2001. A petition for rehearing was denied on November 28, 2001 (Pet. App. 208). The petition for a writ of certiorari was filed on February 22, 2002, and granted on June 10, 2002. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent provisions of the Clean Water Act (CWA), 33 U.S.C. 1251 *et seq.*, are reprinted at Add., *infra*, 1a-5a. Pertinent regulations of the Army Corps of Engineers, 33 C.F.R. Part 323, are reprinted at Add., *infra*, 6a-8a, and those of the Environmental Protection Agency, 40 C.F.R. Part 232, are reprinted at Add., *infra*, 9a-11a.

STATEMENT

Petitioners seek reversal of a court of appeals judgment affirming a district court decision that petitioners violated Sections 301 and 404 of the Clean Water Act, 33 U.S.C. 1311, 1344, by discharging dredged and fill material into waters of the United States without a permit. Petitioners converted approximately 924 acres of former grazing land into lands suitable for cultivation of deep rooted crops by means of a process known as "deep ripping," which involves the use of bulldozers pulling four-to-seven-foot-long metal shanks

through the ground to break up and redistribute essentially impermeable subsurface materials. In doing so, they filled two acres of wetlands with dirt, rock, sand, and biological matter. Those wetlands are conceded to be waters of the United States and therefore within the geographic scope of Section 404's permitting program.

Section 404 places no limitation on petitioners' deep ripping of the many acres surrounding the wetlands. However, the United States Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) consistently and repeatedly told petitioners that they needed to obtain a Section 404 permit before engaging in deep ripping *in* the wetlands themselves. Petitioners did not do so, and instead they repeatedly engaged in deep ripping of wetland areas. When the Corps and EPA continued to seek petitioners' compliance with Section 404's requirements, petitioners brought this lawsuit. EPA then counterclaimed that petitioners had violated the Clean Water Act. The district court rejected petitioners' claim that their activities are not subject to Section 404's requirements. Because of the "relative seriousness" of the violations and petitioners' "lack of earnest effort to comply with the Act" (Pet. App. 117), the court imposed a substantial civil penalty. The court of appeals affirmed.

A. The Clean Water Act

The Clean Water Act establishes a comprehensive program for regulation of pollution discharges, including the discharge of dredged or fill materials into waters of the United States. The Federal Water Pollution Control Act Amendments of 1972 (the 1972 Amendments) established the primary components of the current regulatory structure and instituted the Section 404 permitting program. Pub. L. No. 92-500, § 2, 86 Stat. 884. Congress refined that program through the Clean Water Act of 1977 (the 1977 Amendments), which, among other things, created the Section

404(f) exemption for "normal farming, silviculture, and ranching activities." Congress explicitly excepted from that exemption discharges that bring an area of waters of the United States into a new use and that impair the flow or reduce the reach of such waters. Pub. L. No. 95-217, § 67(a)-(b), 91 Stat. 1600. The Water Quality Act of 1987, Pub. L. No. 100-4, § 313(d), 101 Stat. 45-46, retained the Section 404 regulatory structure, but increased the maximum civil penalty for violations and clarified the method for calculating penalties.

1. The 1972 Amendments. Congress enacted the 1972 Amendments "to restore and maintain the chemical, physical and biological integrity of the Nation's waters," 33 U.S.C. 1251(a). See *Solid Waste Agency (SWANCC)* v. *United States Army Corps of Eng'rs*, 531 U.S. 159, 166 (2001); *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985). That objective embraced "a broad, systemic view of the goal of maintaining and improving water quality," including preservation of "the natural structure and function of ecosystems." *Id.* at 132 (quoting H.R. Rep. No. 92-911, at 76 (1972)). "Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.'" *Id.* at 132-133 (quoting S. Rep. No. 92-414, at 77 (1971)).

To achieve the stated objective, Congress set forth key provisions that, for 30 years, have remained fundamental features of the Clean Water Act. Congress declared in Section 301(a) that, except as provided in other specified sections of the Act, "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. 1311(a). It set out relevant definitions in Section 502 of the Act. See 33 U.S.C. 1362. Congress defined the term "discharge of pollutants" to include "any addition of any pollutant to navigable waters from

any point source." 33 U.S.C. 1362(12)(A). It defined the term "pollutant" to include a wide variety of materials, including "dredged spoil," "biological materials," "rock," "sand," and "cellar dirt," 33 U.S.C. 1362(6), and it broadly defined the term "navigable waters" to mean "waters of the United States." 33 U.S.C. 1362(7). Furthermore, Congress defined the term "point source" to mean "any discernible, confined and discrete conveyance * * * from which pollutants are or may be discharged." 33 U.S.C. 1362(14).

As this Court has long recognized, Section 301(a) prohibits a person from discharging dredged or fill materials from a point source into wetlands that qualify as "waters of the United States"—sometimes called "jurisdictional wetlands" ——unless that person obtains a permit in accordance with Section 404 of the Act. 33 U.S.C. 1311(a), 1344. See *Riverside Bayview Homes*, 474 U.S. at 123. As a Senate Committee has explained, Congress has charged the Corps with responsibility for issuing Section 404 permits to

> control the adverse effects caused by point source discharges of dredged or fill material into the navigable waters including: (1) the destruction and degradation of aquatic resources that results from replacing water with dredged material or fill material; and (2) the contamination of water resources with dredged or fill material that contains toxic substances.

S. Rep. No. 95-370, at 74 (1977). As Congress, the courts, EPA, and the Corps have all long recognized, the Section 404 permitting process is crucial to preserving and restoring aquatic ecosystems because wetlands "play a key role in protecting and enhancing water quality" and "serve significant natural biological functions." *Riverside Bayview Homes*, 474 U.S. at 133-135 (citing Corps statements and regulations).[1]

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[1] See, *e.g.*, *United States* v. *Deaton*, 209 F.3d 331, 336 (4th Cir. 2000); *United States* v. *Larkins*, 657 F. Supp. 76, 86 (W.D. Ky. 1987), aff'd, 852 F.2d 189 (6th Cir. 1988), cert. denied, 489 U.S. 1016 (1989); *United States* v. *Holland*, 373 F. Supp. 665, 675 (M.D. Fla. 1974); 16 U.S.C. 3901(a); 40 C.F.R. Pt. 230.

Congress also provided mechanisms for enforcing Section 301(a)'s discharge prohibition. Section 309 authorizes the government to issue compliance orders, pursue judicial injunctive relief, and seek criminal and civil penalties. See 33 U.S.C. 1319. Section 309, as set out in the 1972 Amendments, specified that any person who violated Section 301(a) "shall be subject to a civil penalty not to exceed $10,000 per day of such violation." 33 U.S.C. 1319(d) (Supp. II 1972) (86 Stat. 860).

2. The 1977 Amendments. The 1977 Amendments were "a major piece of legislation aimed at achieving 'interim improvements within the existing framework' of the Clean Water Act." *Riverside Bayview Homes, Inc.*, 474 U.S. at 135 (quoting H.R. Rep. No. 95-139, at 1-2 (1977)). Congress held extensive hearings on the implementation of the Clean Water Act and specifically addressed, among other things, the competing concerns that agricultural practices seriously degrade the Nation's waters, but that extensive federal regulation of agricultural practices could impose hardships on farmers.[2]

Congress declined to exempt all agricultural lands or practices from regulation. Instead, it took carefully measured steps to address specific problems. For example, Congress made limited changes to the provisions of the 1972 Amendments that addressed the term of art "point source." See

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[2] As the Report of the Senate Committee on Environment and Public Works noted, "[a]griculture was demonstrated to be a major source of pollution." S. Rep. 95-370, at 9 (1977). But as the Report also noted, "[t]he upland farming, forestry and normal development activity carried out primarily by individuals and as part of family business or family farming activity need not bear the burden of an effort directed primarily at regulating the kinds of activities which interfere with the overall ecological integrity of the Nation's waters." *Id.* at 10.

CWA § 502(14), 33 U.S.C. 1362(14). Congress retained the specification that a "concentrated animal feeding operation" is a point source, but it explicitly provided that the term "point source" does not include "return flows from irrigated agriculture." See *ibid.*[3]

The 1977 Amendments did not exempt any other agricultural activity from the definition of "point source." Congress, however, did address the application of the Section 404 program to "normal farming, silviculture, and ranching activities" through a new provision contained within Section 404 itself. Congress added a new subsection (f), which provides:

> (1) Except as provided in paragraph (2) of this subsection, the discharge of dredged or fill material–
>
> > (A) from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices;
>
> * * * * *
>
> is not prohibited by or otherwise subject to regulation under this section or section 1311(a) or 1342 of this title. * * *
>
> (2) Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters

[3] The Senate Report indicates that "[t]he current strategy in the act to divide agriculture into point and nonpoint sources is effective with regard to feedlots, but ineffective with regard to irrigation return flows." S. Rep. No. 95-370, at 9.

> be reduced, shall be required to have a permit under this section.

33 U.S.C. 1344(f). In other words, Congress recognized that even "normal" farming activities, such as "plowing," could result in discharges of dredged or fill material into waters of the United States. But it exempted those activities from the Section 404(f) permitting process, provided that the activity in question did not bring an area into a new use and impair the flow or circulation, or reduce the reach, of those waters.[4]

The 1977 Amendments also made other significant changes to Section 404, adding subsections (d) through (t). Those subsections, among other things, authorize the Corps to issue "general permits on a State, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material" if the Corps determines "the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment." 33 U.S.C. 1344(e). They also authorize individual States to administer their own permit

[4] The legislative history reveals that Section 404(f) was a compromise formulated by the Conference Committee, in response to divergent House and Senate proposals, that struck a balance between the concerns of agriculture and the congressional goal of wetlands protection. H.R. Conf. Rep. No. 95-830, at 100-101 (1977). As Senator Muskie, the Senate manager in conference, explained in the debate on the conference bill:

> New subsection 404(f) provides that Federal permits will not be required for those narrowly defined activities that cause little or no adverse effects either individually or cumulatively. While it is understood that some of these activities may necessarily result in incidental filling and minor harm to aquatic resources, the exemptions do not apply to discharges that convert extensive areas of water into dry land or impede circulation or reduce the reach or size of the water body.

3 CRS, Library of Congress, *A Legislative History of the Clean Water Act of 1977*, at 474 (1978) (*Leg. His.*), (Sen. Muskie, Dec. 14, 1977).

programs for certain waters of the United States, 33 U.S.C. 1344(g)-(*l*), and authorize the Corps to take enforcement action, including the pursuit of civil penalties, in response to permit violations, 33 U.S.C. 1344(s).

3. The 1987 Amendments. Congress revisited the Clean Water Act through the 1987 Amendments and made numerous changes, but made only one significant change to Section 404. Recognizing the potentially serious consequences of Clean Water Act violations, including Section 404 permit violations, it increased the maximum penalty from "$10,000 per day of such violation" to "$25,000 per day for each violation." 33 U.S.C. 1344(s)(4) (Section 404 permit violations); see CWA § 309(d), 33 U.S.C. 1319(d) (other Clean Water Act violations, including discharges without a permit). In changing the basis for computing the penalty, it also intended "to clarify that each distinct violation is subject to a separate daily penalty assessment of up to $25,000." H.R. Rep. No. 99-1004, at 132 (1986).[5]

B. The Corps' And EPA's Regulations

The Corps and EPA share responsibility for implementing the Section 404 program, and each has issued regulations, following public notice and comment, identifying activities that are subject to regulation. See CWA §§ 101(d), 501(a), 33 U.S.C. 1251(d), 1361(a). The pertinent Corps regulations, which are set out primarily at 33 C.F.R. Pt. 323, address, among other things, the types of dredge and fill activities that require a Section 404 permit and the scope of Section 404(f)'s "normal farming" exemption. Parallel EPA regulations are set out at 40 C.F.R. Pt. 232.

[5] Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890 (28 U.S.C. 2461 note), as amended by the Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (31 U.S.C. 3701 note), the statutory maximum penalty for violations of the Clean Water Act was increased to $27,500 per day per violation for violations occurring after January 30, 1997.

The regulations applicable to this case define "dredged material" to mean "material that is excavated or dredged from waters of the United States." 33 C.F.R. 323.2(c); 40 C.F.R. 232.2. At the relevant time, they defined the term "discharge of dredged material" to mean "any addition of dredged material into, including any redeposit of dredged material within, the waters of the United States." 33 C.F.R. 323.2(d)(1) (1994), 40 C.F.R. 232.2 (1994).[6] Those discharges include an addition or redeposit "which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation." 33 C.F.R. 323.2(d)(1)(iii); 40 C.F.R. 232.2. The Corps' regulations defined "fill material" to mean "any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a[] waterbody," 33 C.F.R. 323.2(e) (1994), while EPA's regulations similarly defined that term to mean "any 'pollutant' which replaces portions of the 'waters of the United States' with dry land or which changes the bottom elevation of a water body for any purpose," 40 C.F.R. 232.2 (1994).[7] The "discharge of fill material" means "the addition of fill material into waters of the United States." 33 C.F.R. 323.2(f); 40 C.F.R. 232.2.

The agencies' regulations specifically acknowledge Section 404(f)'s "normal farming" exemption, repeating its terms

[6] After the events at issue in this case, the agencies amended the definition in response to *National Mining Ass'n* v. *United States Army Corps of Eng'rs*, 145 F.3d 1399 (D.C. Cir. 1998), to state "any addition of dredged material into, including redeposit of dredged material other than incidental fallback within, the waters of the United States." 64 Fed. Reg. 25,123 (1999).

[7] The agencies have since amended the definition of "fill material" to state "the term fill material means material placed in waters of the United States where the material has the effect of: (i) [r]eplacing any portion of a water of the United States with dry land; or (ii) [c]hanging the bottom elevation of any portion of a water of the United States." 67 Fed. Reg. 31,142-31,143 (2002).

verbatim. 33 C.F.R. 323.4(a)(1)(i); 40 C.F.R. 232.3(c)(1)(i). They further state that, to fall under the exemption, the activities in question "must be part of an established (i.e. ongoing) farming, silviculture, or ranching operation" and that "[a]ctivities which bring an area into farming, silviculture, or ranching use are not part of an established operation." 33 C.F.R. 323.4(a)(1)(ii); 40 C.F.R. 232.3(c)(1)(ii). The regulations define the terms "cultivating," "harvesting," "minor drainage," "plowing," and "seeding." 33 C.F.R. 323.4(a)(1)(iii); 40 C.F.R. 232.3(d). With respect to plowing, the regulations state:

> *Plowing* means all forms of primary tillage, including moldboard, chisel, or wide-blade plowing, discing, harrowing and similar physical means utilized on farm, forest or ranch land for the breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops. The term does not include the redistribution of soil, rock, sand, or other surficial materials in a manner which changes any area of the waters of the United States to dry land. For example, the redistribution of surface materials by blading, grading, or other means to fill in wetland areas is not plowing. * * *.

33 C.F.R. 323.4(a)(1)(iii)(D); see 40 C.F.R. 232.3(d)(4). The regulations further state that "[p]lowing *as described above*, will never involve a discharge of dredged or fill material." *Ibid.* (emphasis added). Accord 33 C.F.R. 323.2(f)

The agencies have provided informal guidance as well. The Corps issued Regulatory Guidance Letter No. 86-01 (Feb. 11, 1986), which reiterated its regulatory definition of plowing. See Add., *infra*, 12a-13a. The Corps and EPA also issued a Memorandum to the Field on December 12, 1996, following the entry of an administrative order on consent in this case, specifically addressing the application of Section 404 to "deep ripping" activities, such as those that precipitated this dispute. Pet. App. 199-207; Add., *infra*, 14a-21a. The agencies noted that:

> Deep-ripping and related activities are distinguishable from plowing and similar practices (e.g., discing, harrowing) with regard to the purposes and circumstances under which it is conducted, the nature of the equipment that is used, and its effect, including the particular impacts to the hydrology of the site.

Add., *infra*, 18a. They concluded that:

> Deep-ripping and related activities in wetlands are *not* part of a normal, ongoing activity, and therefore *not* exempt, when such practices are conducted in association with efforts to establish for the first time * * * an agricultural, silvicultural, or ranching operation. In addition, deep-ripping and related activities are not exempt in circumstances where such practices would trigger the "recapture" provision of Section 404(f)(2) * * *.

Id. at 20a.

C. The Facts Of This Case

The district court based its decision on detailed findings of fact, Pet. App. 67-92, which the court of appeals affirmed, *id.* at 11-12. Petitioners largely disregard those findings, which they have not challenged and which are not open to dispute in this proceeding. See, *e.g.*, *United States* v. *Ceccolini*, 435 U.S. 268, 273 (1978); *Graver Tank & Mfg.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949). The facts, as found by the district court, and the undisputed facts set out in the district court's amended order granting partial summary judgment (Pet. App. 28-56), are as follows:

1. In June 1993, petitioner Angelo K. Tsakopoulos, the general partner of petitioner Borden Ranch Partnership, purchased Borden Ranch, an 8348-acre ranch located in California's Central Valley, for approximately $8.3 million. Pet.

App. 2, 68. The Ranch straddles Dry Creek, which forms the border between Sacramento and San Joaquin Counties, and had primarily been used as rangeland for cattle grazing. *Id.* at 2, 44, 68; SER 76.[8] Tsakopoulos intended to subdivide the Ranch and sell individual parcels that would be suitable for cultivation as vineyards and orchards, which would increase the value of the property. Pet. App. 2, 47, 68.

To accomplish this goal, Tsakopoulos needed to address the Ranch's soil and hydrology. Portions of the subsurface strata of the Ranch consisted of a dense, essentially impermeable layer of material, variously described as a "restrictive layer" or "claypan," that prevented surface water from reaching the depths required for cultivating vineyards or orchards, which have deep root systems. Pet. App. 2-3, 44-45, 69. Tsakopoulos planned to solve this problem through "deep ripping," which consisted of employing bulldozers or tractors to drag four-to-seven-foot-long metal shanks through the soil. *Id.* at 3, 35-36, 44-45, 69-70. Those shanks would "gouge[] through the restrictive layer, disgorging soil that is then dragged behind the ripper." *Id.* at 3; see *id.* at 35-36, 44, 69-70. Deep ripping was neither necessary nor was it utilized to maintain the Ranch lands for grazing, but it was essential to prepare the area for its intended new use. *Id.* at 2-3, 44-45, 69.

As Tsakopoulos knew at the time he purchased the Ranch, the property included not only upland, but also significant hydrological features, including swales, intermittent drainages, and vernal pools. Pet. App. 2, 68-69, 70.[9] Those features arise precisely because of the presence of the essentially impermeable restrictive layer that prevents surface water from penetrating deeply into the soil. *Ibid.* The swales and drainages of interest in this case are hydrologically connected to creeks on the property, which in turn are tributaries of the Cosumnes and Mokelumne Rivers. *Id.* at 69; ER 29 (wetland delineation of San Joaquin side of the Ranch).[10]

Deep ripping, particularly at the depth and on the scale that Tsakopoulos planned, has a dramatic effect on the character of a wetland area. As the district court specifically found, deep ripping "alters the movement of surface and subsurface water in the ripped areas by moving earth, rock, sand, and biological matter both horizontally and vertically. This allows water to percolate to greater depths and limits or destroys the ability of jurisdictional waters to retain water." Pet. App. 70. As a result of deep ripping, wetland features can be—and in this case were—"completely filled" and "obliterated." *Id.* at 87-88, 106.

Tsakopoulos, an experienced real estate developer who had previously sought Section 404 permits, "was aware that most or all of the [hydrologic] features constituted 'waters of the United States.'" Pet. App. 2, 70. The Corps expressly informed him in mid-1993 that he would need to obtain a Section 404 permit before deep ripping in those waters. *Id.* at 70-71. Nevertheless, in October 1993, he initiated deep ripping in wetlands without a permit on a portion of the Ranch. *Id.* at 3, 71-72. The Corps attempted to resolve the matter consensually and, in March 1994, granted Tsakopou-

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[8] Some of the "bottom ground" along Dry Creek had also been used for growing wheat, hay, alfalfa, tomatoes, sugar beets, beans, and corn, but that part of the Ranch is not at issue in this case. Pet. App. 2, 68; SER 76. See note 27, *infra*.

[9] "A swale is a sloped wetland containing aquatic plant life which allows passage of small animal life, slows peak water flows, filters water, and minimizes erosion and/or sedimentation. A vernal pool is a low point in the landscape underlain with a dense soil layer and wherein rainwater collects. * * * Intermittent drainages are basically streams or water courses with a defined bed and bank that generally transport water during and after rains." Pet. App. 69.

[10] Petitioners do not contest that the swales and drainages at issue in this proceeding are "waters of the United States" within the meaning of the Clean Water Act. See Br. 2 n.1.

los an "after-the-fact" permit for that activity in exchange for Tsakopoulos's agreement to undertake certain mitigation activities, including construction of 4.77 acres of seasonal wetlands. *Id.* at 3, 72.

At a meeting in September 1994, Tsakopoulos informed the Corps and EPA that he intended to resume deep ripping uplands, and those agencies again informed Tsakopoulos that he was not to deep rip in protected waters without a permit. Pet. App. 3, 73. Nevertheless, the agencies discovered in April 1995 that Tsakopoulos had undertaken more unpermitted deep ripping of wetlands. *Id.* at 3, 74. The Corps responded by issuing a cease-and-desist letter directing him to stop deep ripping in waters of the United States. *Id.* at 3, 74. Tsakopoulos submitted a permit application in May, and the Corps sent him a permit by the end of the month. *Id.* at 74.

In summer 1995, Tsakopoulos initiated further deep ripping on other parcels of the Ranch without a permit, and in November 1995, the Corps issued another cease and desist order. Pet. App. 3, 74-75. In May 1996, the government and Tsakopoulos entered into an "administrative order on consent" (AOC) to resolve the ongoing dispute, which implicated 49.1 acres of waters of the United States on the Sacramento County side of the Ranch. *Id.* at 3, 77. Tsakopoulos agreed to cease further discharges into waters of the United States except in compliance with an appropriate authorization under the Clean Water Act. *Id.* at 78. By the time of the AOC, Tsakopoulos had deep ripped and sold 4,036 acres of the Ranch for a total of approximately $16.2 million. *Id.* at 77.

Despite the entry of the AOC, and the preparation of a map specifically identifying the location of waters of the United States, Tsakopoulos resumed deep ripping those waters without a permit in November 1996. Pet. App. 4, 76-77, 78, 79-80, 82-83. After EPA investigators visited the Ranch in April 1997 and observed fully-engaged rippers at work in

jurisdictional wetlands, EPA issued an administrative order finding that Tsakopoulos had violated the Clean Water Act. *Id.* at 4, 83-84, 103.[11] In a meeting later that month, the agencies confronted Tsakopoulos with evidence of the violations, and he "then conceded that mistakes had been made." *Id.* at 11, 85.[12]

2. After the April 1997 meeting, petitioners initiated this action challenging the authority of the Corps and EPA to regulate deep ripping. EPA counterclaimed, seeking injunctive relief and civil penalties for Clean Water Act violations

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[11] Petitioners assert that all deep ripping activities at issue in this action were complete prior to December 1996. Br. 13. This assertion conflicts with the district court's finding that, *e.g.*, "eyewitness evidence reveals that, in April of 1997, deep ripping of unspecified jurisdictional features occurred on parcel 8." Pet. App. 103. The government did not seek the higher penalty available for violations occurring after January 30, 1997, however, because it was not clear which of the wetlands were affected by the April 1997 ripping, as opposed to the November 1996 ripping. *Id.* at 103-104. See also ER 630 ¶ 13 (Tsakopoulos acknowledges that he authorized spring 1997 deep ripping in parcel 8 on San Joaquin County side of the Ranch).

[12] Petitioners assert that, "[r]elying on the Corps' contradictory oral and written advice differentiating among different forms of plowing based on depth, Tsakopoulos tried to plow in ways the Corps told him would not require permits." Br. 12. The district court rejected that claim:

> Tsakopoulos deliberately obfuscated his understanding of the Corps' guidance respecting driving over vernal pools and undermined the Corps' enforcement authority by wrongly stating the agency gave him confusing guidance as to the nature of the contact he could have with jurisdictional waters. He knew he was not authorized to deep rip any jurisdictional features.

Pet. App. 114. See *id.* at 73 n.2 (Tsakopoulos's "testimony [respecting discing in vernal pools] was not veracious and is belied by the consistent position federal officials expressed to Tsakopoulos on this matter."); *id.* at 114 n.19 ("Tsakopoulos knew that the Corps'[] direction to him about his activities on jurisdictional waters was clear and consistent."); *id.* at 115 ("the evidence demonstrates that there was no serious effort to avoid waters of the United States when deep rippers plowed nearly all of parcel 10").

in connection with petitioners' deep ripping activities involving parcels 6, 8, 9, and 10 on the San Joaquin County side of the Ranch, which had not been addressed through the AOC. Pet. App. 4, 67, 86; see *id.* at 86-92 (describing those parcels). Those four parcels comprise some 924 acres. See *id.* at 76, 88, 89.[13]

The parties moved for summary judgment, and the district court granted partial summary judgment in favor of the government. Pet. App. 28-56. The district court dismissed petitioners' claims, holding that petitioners' activities were subject to the Section 404 permitting process because they "may cause discharge of fill material or pollutant into waters of the United States." *Id.* at 41. The district court further held that petitioners' activities did not qualify for Section 404(f)(1)'s normal farming exemption, *id.* at 42-47, and that, even if they did, those activities were recaptured under Section 404(f)(2), *id.* at 47-49. The district court determined, however, that there remained disputed facts concerning the extent and effects of particular instances of deep ripping. *Id.* at 5, 41.

The district court resolved those factual issues after a four-week bench trial at which the court heard evidence from more than twenty witnesses and received hundreds of documentary exhibits. Pet. App. 5; see *id.* at 67-121. The district court determined that petitioners' deep ripping had filled approximately two acres of jurisdictional wetlands and resulted in 358 violations, relying on the parties' apparent agreement that each pass of a ripper through a protected wetland constitutes a separate violation. *Id.* at 5, 103, 104. The court observed that "[t]he relative seriousness of Tsakopoulos' violations and his lack of earnest effort to comply with the Act merit a significant penalty." *Id.* at 117. The

[13] The government's calculation of the acreage of those parcels rests, in part, on petitioners' responses to interrogatories, which are not part of the record.

court therefore rejected Tsakopoulos's proposal that, "if a civil penalty is to be imposed, it should not exceed $97.26." *Id.* at 101. Nevertheless, the court did not assess its calculated maximum civil penalty of $8,950,000 and, instead, gave petitioners the choice of paying a $1.5 million civil penalty or paying a $500,000 penalty and restoring four acres of wetlands. *Id.* at 5, 105. Petitioners chose the latter option. *Id.* at 5, 127-133.

3. The court of appeals affirmed "the district court's holding that deep ripping in this context is subject to the jurisdiction of the Corps and the EPA." Pet. App. 17. It noted that the courts of appeals have consistently held that redeposit of materials into waters of the United States can constitute an "addition of a pollutant" under the Clean Water Act. *Id.* at 6-8. The court of appeals also rejected petitioners' contention that redeposits from a "plow" are not discharges from a "point source." *Id.* at 8-9. The court reasoned that "[t]he statutory definition of a 'point source' ('any discernible, confined, and discrete conveyance') is extremely broad," that other courts "have found that 'bulldozers and backhoes' can constitute 'point sources,'" and that the combination of "bulldozers and tractors" pulling "large metal prongs" also satisfies the statutory definition. *Ibid.*

The court of appeals concluded that petitioners' deep ripping was not exempt from regulation under Section 404(f)(1)'s normal farming exemption. Pet. App. 9-10. The court observed that the exemption is subject to a "significant qualifying provision," because "even normal plowing can be regulated under the Clean Water Act if it falls under this so-called 'recapture' provision" in Section 404(f)(2). *Id.* at 9. The court of appeals agreed with the district court that "[c]onverting ranch land to orchards and vineyards is clearly bringing the land 'into a use to which it was not previously subject,' and there is a clear basis in this record to conclude that the destruction of the soil layer at issue here constitutes

an impairment of the flow of nearby navigable waters." *Id.* at 10. The court accordingly "conclud[ed] that the deep ripping at issue in this case is governed by the recapture provision" and that it was "entirely proper" for the government to exercise jurisdiction over petitioners' deep ripping. *Ibid.*

The court of appeals affirmed the district court's calculation of the civil penalty. Pet. App. 12. It rejected petitioners' argument that the Clean Water Act imposes a maximum penalty of $25,000 for any day in which ripping violations occurred, regardless of the total numbers of rippings in the day. The court stated that the focus in the statutory penalty provision "is clearly on *each* violation" and that a contrary rule would encourage violators to "stack" violations on particular days. *Id.* at 13. The court of appeals concluded that petitioners' other challenges to the civil penalty assessment, none of which they raise here, lacked merit. *Id.* at 12.

The court of appeals reversed the district court's findings of Clean Water Act violations in one isolated vernal pool in light of the government's withdrawal of its enforcement claim for that pool as a result of this Court's decision in *SWANCC*, 531 U.S. at 171. Pet. App. 10-11. The court accordingly remanded the case to the district court for recalculation of the civil penalty. *Id.* at 17. Judge Gould dissented. *Id.* at 18-22. He would have held "that the district court erred in finding that the activities here required a permit and otherwise violated the Clean Water Act." *Id.* at 22.

SUMMARY OF ARGUMENT

I. Petitioners discharged pollutants, specifically, dredged and fill materials, into waters of the United States without a permit, in violation of Sections 301(a) and 404 of the Clean Water Act, 33 U.S.C. 1311(a), 1344. Section 502(12) defines the "discharge of a pollutant" as the "addition of any pollutant" from "any point source." 33 U.S.C. 1362(12). Petitioners' use of deep rippers—a form of earthmoving equipment—to fill wetlands plainly meets that definition.

A. The material in question—rock, sand, dirt, and biological matter—falls squarely within Section 502(6)'s definition of a "pollutant," which includes "dredged spoil," "biological materials," "rock," and "sand." 33 U.S.C. 1362(6). It also falls within the conventional understanding and applicable regulatory definitions of "dredged material," which is "material that is excavated or dredged from waters of the United States," 33 C.F.R. 323.2(c); 40 C.F.R. 232.2, and "fill material," which includes "any material" that is used for the purpose of filling a wetland, 33 C.F.R. 323.2(e) (1994); 40 C.F.R. 232.2 (1994).

B. Petitioners' deep ripping activities resulted in the "addition" of the pollutants. The district court found that those activities resulted in filling the wetlands through the horizontal movement of material from adjacent uplands and the vertical movement of material from beneath the wetland. The district court did not credit petitioners' factual claim that its activities merely "turned soil in place" and "added nothing." Indeed, even if petitioners had merely ripped materials from within the wetlands and redeposited them there, that activity would change the character of the removed materials and result in the addition of a pollutant. The applicable regulations state, and the courts have repeatedly held, that the filling of a wetland through the removal and redeposit of materials therein is a discharge of dredged materials. 33 C.F.R. 323.2(d)(1) (1994); 40 C.F.R. 232.2 (1994).

C. Petitioners' use of deep rippers resulted in an addition of pollutants "from a point source." Section 502(14) defines a "point source" as "any discernible, confined and discrete conveyance * * * from which pollutants are or may be discharged." 33 U.S.C. 1362(14). The earthmoving equipment that petitioners employed meets that definition because it constitutes an identifiable, limited, and distinct physical

means for adding dredged and fill materials to a wetland. The courts of appeals have consistently treated earthmoving equipment of this character as a point source.

D. Section 404(f)'s conditional exemption for "normal" farming provides an additional textual indication that petitioners' activities, which they describe as mere "plowing," resulted in a discharge of a pollutant. 33 U.S.C. 1344(f). Congress created that exemption precisely because it recognized that even "normal" farming activities, such as ordinary "plowing," could result in the discharge of a pollutant within the meaning of the Clean Water Act.

II. Section 404(f) does not exempt petitioners' deep ripping from the Section 404 permitting process because petitioners' activity does not qualify as a "normal" farming activity under Section 404(f)(1)(A) and, even if it did, it would be subject to the exception to that exemption, set out in Section 404(f)(2). 33 U.S.C. 1344(f).

A. Petitioners' activities do not satisfy the requirements of Section 404(f)(1)(A) for two reasons. First, they are not part of an ongoing farming operation. 33 C.F.R. 323.4(a)(1)(ii); 40 C.F.R. 232.3(c)(1)(ii). The district court found that there was no ongoing farming operation on the areas at issue and that the deep ripping was necessary to prepare the area for the change in use. Second, petitioners' activity did not meet the regulatory definition of plowing, which "does not include the redistribution of soil, rock, sand, or other surficial materials in a manner which changes any area of the waters of the United States to dry land." 33 C.F.R. 323.4(a)(1)(iii)(D); see 40 C.F.R. 232.3(d)(4). Petitioners' deep ripping activities did exactly that.

B. Even if petitioners' activities constituted "normal" farming, they would not be exempt because those activities had as their purpose "bringing an area of the navigable waters into a use to which it was not previously subject" and, as a consequence of the resulting discharge of dredged and fill

materials, "the flow or circulation" of protected waters was "impaired" and "the reach of such waters" was "reduced." 33 U.S.C. 1344(f)(2). The district court found that petitioners undertook their deep ripping activities to change the use of the areas at issue and that those activities filled and destroyed protected wetlands.

III. The lower courts correctly calculated the maximum civil penalty that might be imposed in this case in accordance with Section 309(d), which authorizes a penalty not to exceed "$25,000 per day for each violation." 33 U.S.C. 1319(d). Contrary to petitioners' contentions, Section 309(d) does not create a maximum penalty cap of $25,000 per day. Rather, by its plain terms, Section 309(d) authorizes a daily penalty of $25,000 per violation for those violations that continue for more than one day. In this case, the district court correctly treated each violation—*viz.*, a pass of the ripper through a protected wetland—as occurring on a single day and as subject to a maximum penalty of $25,000. That approach is consistent with settled law.

ARGUMENT

Petitioners engaged in a practice known as "deep ripping" to convert ranchland into farmland capable of supporting deep-rooted crops. Section 404 does not prevent land developers and farmers from using that technique to excavate claypan and similar subterranean soil strata from uplands. Petitioners needed to obtain a Section 404 permit, however, before employing that highly destructive technique in waters of the United States. Petitioners' earthmoving activities, which filled federally protected wetlands with rock, sand, dirt, and biological matter, fall squarely within the Clean Water Act's prohibition of the unpermitted discharge of pollutants from a point source. Those activities, which, in the words of the trial court, "completely obliterated" numerous wetlands, also clearly fall outside of Section 404(f)'s exemption for normal farming activities that do not have as

their purpose bringing an area of waters of the United States into a new use, changing the waters' flow or circulation or impairing their reach. The district court correctly concluded that petitioners acted unlawfully, and it properly calculated an appropriate civil penalty based on the Clean Water Act's specific direction that the maximum penalty shall be "$25,000 per day for each violation," 33 U.S.C. 1319(d), rather than petitioners' preferred alternative of $25,000 per day regardless of the number of violations that occurred on a given day.

I. PETITIONERS' USE OF EARTHMOVING EQUIPMENT, WHICH FILLED WETLANDS WITH ROCK, SAND, DIRT, AND BIOLOGICAL MATTER, RESULTED IN DISCHARGES OF POLLUTANTS SUBJECT TO REGULATION UNDER SECTION 404 OF THE CLEAN WATER ACT

Petitioners analogize their deep ripping activities to ordinary plowing, which they contend does not result in the "discharge of a pollutant" within the meaning of the Clean Water Act. Br. 20-31. The court of appeals and the district court correctly rejected that argument. Petitioners' characterization of their deep ripping activities is inconsistent with the district court's factual findings, and petitioners' legal argument is inconsistent with the Clean Water Act's language, structure, and purpose. Petitioners' arguments are also inconsistent with the regulations of the Corps and EPA, which are entitled to substantial deference.[14]

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[14] See, *e.g.*, *Chemical Mfrs. Ass'n* v. *Natural Res. Def. Council*, 470 U.S. 116, 125 (1985) (EPA's view of the Clean Water Act is "entitled to considerable deference; and to sustain it, we need not find that it is the only permissible construction that EPA might have adopted but only that EPA's understanding of this very 'complex statute' is a sufficiently rational one to preclude a court from substituting its judgment for that of EPA."); accord *EPA* v. *National Crushed Stone Ass'n*, 449 U.S. 64, 83-84 (1980).

A. The Rock, Sand, Dirt, And Biological Matter That Petitioners Used To Fill The Wetlands Are "Pollutants"

As the district court found, petitioners employed earthmoving equipment—bulldozers fitted with "long metal 'shanks'"—to "dig into the ground to a depth of five to seven feet," ripping up a "restrictive layer" of subsurface material. Pet. App. 69-70. That practice

> alters the movement of surface and subsurface water in the ripped areas by moving earth, rock, sand, and biological matter both horizontally and vertically. This allows water to percolate to greater depths and limits or destroys the ability of jurisdictional waters to retain water.

Id. at 70. As the district court additionally found, petitioners' practice of deep ripping "caused fill material to be discharged into 35 hydrological features," *id.* at 86, partially or totally filling—and in some cases "completely oblitera[ting]"—waters of the United States, *id.* at 87-92.[15]

Petitioners incorrectly contend that the discharged material—the "earth, rock, sand, and biological matter" (Pet. App. 70)—is not a "pollutant" within the meaning of the Clean Water Act. Br. 18, 20-21, 23-24. Petitioners face a preliminary obstacle to making that argument here because they did not seek the court of appeals' review of the district court's ruling on that question. See Pet. App. 36-37. Instead, they focused their appeal on whether deep ripping resulted in an "addition" of the discharged material, arguing that deep ripping "produces only incidental fallback." See Appellants' C.A. Br. 23-32. The court of appeals correspondingly addressed *that* issue. Pet. App. 6-9. Because petitioners did not properly preserve the question of whether "earth, rock, sand, and biological matter" can constitute a

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[15] Petitioners' amici are accordingly wrong in contending that "[t]he discharge of fill material is not at issue in this case." Nat'l Ass'n of Home Builders Amicus Br. 10.

pollutant, petitioners have effectively conceded that those materials meet the definition. The Court is under no obligation to revisit the matter. See *Lexecon Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 42 n.5 (1998).

In any event, the Clean Water Act makes abundantly clear that those materials are pollutants. Section 502(6) expressly defines the term "pollutant" to include, among other things, "dredged spoil," "rock," "sand," and "biological materials." 33 U.S.C. 1362(6). As Congress knew, the Corps has recognized, and this case illustrates, dredged and fill material typically consists of "earth, rock, sand, and biological matter." Pet. App. 70. See, *e.g.*, *United States* v. *Deaton*, 209 F.3d 331, 335-336 (4th Cir. 2000); *United States* v. *Pozsgai*, 999 F.2d 719, 724 (3d Cir. 1993), cert. denied, 510 U.S. 1110 (1994); *United States* v. *Tilton*, 705 F.2d 429, 430 (11th Cir. 1983); see also 33 C.F.R. 323.2(c) (defining "dredged material" to mean "material that is excavated or dredged from waters of the United States"); 33 C.F.R. 323.2(e) (1994) (defining "fill material" as "*any* material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a[] waterbody") (emphasis added); accord 40 C.F.R. 232.2 (EPA definitions).[16]

That understanding is also confirmed by Sections 301 and 404, which, in tandem, regulate the discharge of dredged or

[16] Contrary to petitioners' suggestion (Br. 23), a substance need not be a "waste" to be a pollutant. For example, a developer who seeks to fill navigable waters to build a shopping center cannot avoid Section 404's permit requirement by using "native topsoil" as fill material (Br. 24), regardless of whether that material is a "valuable natural resource" (*ibid.*). Common fill materials, including "earth, sand, rock, and biological matter" are generally not a "waste material of a human or industrial process" (Br. 23), but they qualify as "pollutants." See, *e.g.*, *Deaton*, 209 F.3d at 336; *United States* v. *Wilson*, 133 F.3d 251, 259, 274 (4th Cir. 1997)(opinions of Judges Niemeyer and Payne, respectively, recognizing that native soils may constitute a pollutant); *Avoyelles Sportsmen's League, Inc.* v. *Marsh*, 715 F.2d 897, 924-925 (5th Cir. 1983).

fill materials. Section 301(a) provides that, "[e]xcept as in compliance with" the Clean Water Act's permitting provisions, including Section 404, "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. 1311(a). Section 404(a) then states that the Corps may issue permits "for the discharge of dredged or fill material." 33 U.S.C. 1344(a). Sections 301(a) and 404(a), read together, unmistakably express Congress's understanding that the term "pollutant" includes "dredged or fill material."

B. Petitioners' Activities Resulted In The "Addition" Of Pollutants To Waters Of The United States

Petitioners next contend that their deep ripping activities did not result in a "discharge of a pollutant" (33 U.S.C. 1362(12)) because it did not result in the "addition" of the pollutants to the filled wetlands. Br. 17, 21-24. See CWA § 502(12), 33 U.S.C. 1362(12) (defining a "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source"). That argument is wrong as a matter of fact and as a matter of law.

As the district court specifically found, petitioners' excavation activity resulted in the movement of the earth, rock, sand, and biological matter "both horizontally and vertically." Pet. App. 70. That activity wrenched materials from the uplands beside the wetlands and from the subterranean claypan beneath them, partially or completely filling hydrological features, in many cases leaving them "completely obliterated." *Id.* at 8, 87-92. Under any reasonable conception of the term "addition," petitioners "added" materials to the wetlands, which are now buried beneath the ripped up materials. See, *e.g.*, *id.* at 92 ("soil is mounded along where the water in this part of the feature had flowed"). Indeed, the district court found that petitioners' rippers, in the course of moving earth, rock, sand, and biological matter as they crossed from uplands through waters of the United

States and back again, filled approximately two acres of wetlands. *Id.* at 89, 92, 105.[17]

Petitioners contend that their filling of those wetlands, which are indisputably waters of the United States, should not be viewed as resulting from an "addition" of fill material because their activities merely "turn soil in place while adding nothing and redepositing nothing." Br. 21. According to petitioners, "the plowed soil never loses contact with the immediately-surrounding ground." *Ibid.* The district court, however did not credit petitioners' characterization of their activities. Pet. App. 69- 70. See, *e.g.*, *id.* at 89 ("upper swale portions have been partially filled due to deep rippers plowing to the edge of the feature and depositing soil into the swale").

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[17] The district court's findings of fact extensively document the extent of fill in each wetland area. The following examples illustrate the damage petitioners caused: (1) "Drainage 9 is an approximately 800-foot-long intermittent drainage * * *. It has been completely filled by deep ripping, discing, and the planting of vineyards" (Pet. App. 87); (2) "Drainage 10 is a 1,300-foot-long north/south intermittent drainage * * *. This wetland also has been nearly completely obliterated due to several passes by a deep ripper with its shank down, subsequent discing and planting with vineyards" (*ibid.*); (3) "Drainage 34 * * * has been completely filled after several passes with a fully-engaged deep ripper and subsequent discing and planting with grapes" (*ibid.*); (4) "Drainage 35 * * * has been deep ripped, disced and planted with vineyards. It was approximately 700 feet long and has been completely filled" (*ibid.*); (5) "[D]rainage 36 * * * has been completely filled by deep ripping, discing and planting" (*ibid.*); "[D]rainage 37 * * * also has been completely filled by deep ripping, discing, and planting" (*ibid.*); (6) "[D]rainage 38 * * * has been similarly filled" (*id.* at 87-88); (7) "[D]rainage 40 * * * is filled after deep ripping; * * * the east-west stretch [of this drainage] is currently used as a dirt road" (*id.* at 88); (8) "Drainage 19 * * * ha[s] been partially filled due to deep rippers plowing to the edge of the feature and depositing soil into the swale" (*id.* at 89); (9) "[D]rainage 32 * * * has been deep ripped, disced, and planted. Resultantly, this feature is nearly completely obliterated" (*id.* at 91); (10) "A 103-foot-long portion of drainage 26 has been completely filled and soil is mounded along where the water in this part of the feature had flowed" (*id.* at 92).

The district court's findings regarding horizontal movement of soil into the protected waters is a sufficient reason, by itself, to conclude that the deep ripping activity resulted in an addition for purposes of the Clean Water Act. Nor does it matter whether the fill material was obtained from uplands areas and subterranean strata a few feet away or a few miles away—the hydrological and environmental effects are the same. As the district court found, petitioners' deep ripping activities resulted in precisely the types of harms that Congress sought to address through the Section 404 permitting process. See *Riverside Bayview Homes*, 474 U.S. at 134-139.[18]

Petitioners' suggestion (Br. 24) that a "discharge" does not occur unless the "addition" constitutes "new materials" transported from a distant site cannot be reconciled with the Clean Water Act's terms. For example, the Act defines the term "pollutant" to include "dredged spoil," 33 U.S.C. 1362(6), and specifically regulates the discharge of "dredged * * * materials," 33 U.S.C. 1344(a), which typically involves the excavation and deposition of the spoil within the same water body. See, *e.g.*, *Avoyelles Sportsmen's League, Inc.* v. *Marsh*, 715 F.2d 897, 923-924 & n.43 (5th Cir. 1983).[19]

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[18] Petitioners filled waters of the United States, impairing and, in many cases, completely destroying those features. Pet. App. 86-92, 105. The district court found in this case that "the damage attributable to [petitioners'] violations, including the diminished effectiveness of these [wetland] features in filtering pollutants in the water system and the decrease in exotic plant and animal life, will accumulate well into the future." *Id.* at 106. The court also found that "[petitioners'] contrary contention that these features have not been significantly affected by the plowing and deep ripping activity is unpersuasive." *Ibid.* The court of appeals credited the district court's findings. *Id.* at 11-12, 17.

[19] Dredged spoil, by definition, consists of material excavated from the bottom of a waterbody or wet area. See *Avoyelles*, 715 F.2d at 924 n.43; 33 C.F.R. 323.2(c) ("dredged material" means "material that is excavated or dredged from waters of the United States"); accord 40 C.F.R. 232.2 (EPA regulations). As a practical matter, "[a] requirement that all pollutants

Similarly, the Act's broad prohibition on the unauthorized discharge of "fill material," 33 U.S.C. 1344(a), contemplates that a wetland can be filled by ripping up the restrictive soil layer that retains the water and depositing the resulting spoil on top of the wetland. As the Corps and EPA have long recognized, filling occurs when material, whatever its source, is used to replace an aquatic area with dry land or to change the bottom elevation of a waterbody. 33 C.F.R. 323.2(e) (1994); 40 C.F.R. 232.2 (1994). See, *e.g.*, *Avoyelles*, 715 F.2d at 924-925 ("significant leveling" resulted in the discharge of "'fill material' into the wetlands"); *United States* v. *Sinclair Oil Co.*, 767 F. Supp. 200, 204 (D. Mont. 1990) (the definition of "fill material" makes no distinction between indigenous and foreign materials).[20]

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must come from outside sources would effectively remove the dredge-and-fill provision from the statute." *Avoyelles*, 715 F.2d at 924 n.43.

[20] Petitioners contend that their deep ripping activities did not result in a discharge of fill material because Corps regulations, until recently amended, defined "fill material" to mean "any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of an [*sic*] waterbody." 33 C.F.R. 323.2(e) (1997). Petitioners contend that the "primary purpose" of their activity was simply "to enhance and revitalize soil for planting new crops." Br. 22. The district court correctly concluded otherwise, finding that petitioners' deep ripping was designed to alter the hydrology of the ripped lands in a way that "destroys the ability of jurisdictional waters to retain water." Pet. App. 70. See *Avoyelles*, 715 F.2d at 924-925 (rejecting defendants' characterization of their landclearing activities, which in fact "chang[ed] the bottom elevation of the waterbody" and "were designed to 'replace the aquatic area with dry land'") (quoting 33 C.F.R. 323.2(e)). Petitioners are also wrong in suggesting (Br. 8, 22) that the court of appeals' decision here is in tension with dicta in its decision in *Resource Invs., Inc.* v. *United States Army Corps of Eng'rs*, 151 F.3d 1162 (9th Cir. 1998), which addressed the relationship between the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6901 *et seq.*, and the Section 404 permitting process. That case involved a solid waste site leak collection system that differs from the fill activities here.

Indeed, even if petitioners' deep ripping activity had truly done no more than remove materials from within a jurisdictional wetland and redeposit them therein, the activity would not be outside the purview of the Clean Water Act. The Fourth Circuit has cogently explained why that is so in *United States* v. *Deaton*, 209 F.3d 331 (2000). The Deatons had hired a contractor to dig a ditch through a wetland area, ignoring advice that they needed to obtain a Section 404 permit. 209 F.3d at 333. The contractor used a bulldozer and other types of heavy machinery to pile dirt on either side of the ditch within the wetland, utilizing a practice known as sidecasting. *Ibid.* When the Deatons refused to comply with the Section 404 permitting process, the government brought a civil suit, and the Deatons challenged the need for a permit on the ground (among others) that the excavation did not result in a discharge of pollutants because there was "no net increase in the amount of material present in the wetland." *Id.* at 335. A unanimous panel of the Fourth Circuit rejected this argument, stating:

> Contrary to what the Deatons suggest, the statute does not prohibit the addition of material; it prohibits "the addition of any pollutant." The idea that there could be an addition of a pollutant without an addition of material seems to us entirely unremarkable, at least when an activity transforms some material from a nonpollutant into a pollutant, as occurred here. In the course of digging a ditch across the Deaton property, the contractor removed earth and vegetable matter from the wetland. Once it was removed, that material became "dredged spoil," a statutory pollutant and a *type* of material that up until then was not present on the Deaton property. It is of no consequence that what is now dredged spoil was previously present on the same property in the less threatening form of dirt and vegetation in an undisturbed state. What is important is that once that mate-

> rial was excavated from the wetland, its redeposit in that same wetland *added* a pollutant where none had been before.

Id. at 335-336.

The same reasoning applies here. The materials within or beneath the wetlands were not pollutants while in place; they constituted the vegetation, soil, and subterranean claypan that defined the wetlands and sustained their wetland character. Those materials became pollutants when they were ripped out and redeposited within the wetlands, thereby destroying that character.

The court of appeals in this case acknowledged the logic of *Deaton* and correctly recognized that the reasoning applies with equal force to the facts here. Pet. App. 6-8. Indeed, the courts of appeals have consistently recognized that a redeposit of dredged or fill material can result in a discharge of a pollutant. See *Rybachek* v. *EPA*, 904 F.2d 1276, 1285 (9th Cir. 1990) (dirt and gravel excavated from a streambed for placer mining and then returned there); *United States* v. *M.C.C. of Fla., Inc.*, 772 F.2d 1501, 1503-1506 (1985) (uprooted and redeposited sea bottom material), vacated on other grounds, 481 U.S. 1034 (1987), readopted in relevant part, 848 F.2d 1133 (11th Cir. 1988); *Avoyelles*, 715 F.2d at 923-925 (redeposit of trees and vegetation dug up during land clearing).

Petitioners mistakenly argue (Br. 22) that the reasoning of *National Mining Ass'n* (*NMA*) v. *United States Army Corps of Eng'rs*, 145 F.3d 1399 (D.C. Cir. 1998), dictates a different result. *NMA* involved a challenge to a regulation known as the "*Tulloch* Rule," which subjected certain redeposits of dredged material, known as "incidental fallback," to Clean Water Act regulation. *Id.* at 1402. As the court of appeals explained, the term "incidental fallback" describes de minimis redeposits of soil during dredging operations, such as "when a bucket used to excavate material from the

bottom of a river, stream, or wetland is raised and soils or sediments fall from the bucket back into the water." *Id.* at 1402-1403. The court of appeals ruled that the Corps' decision to subject incidental fallback to its permitting requirements exceeded the Corps' authority to regulate the "addition" of "dredged material" into the waters of the United States because "the straightforward statutory term 'addition' cannot reasonably be said to encompass the situation in which material is removed from the waters of United States and a small portion of it happens to fall back." *Id.* at 1403-1404. The court, however, expressly stated:

> [W]e do not hold that the Corps may not legally regulate some forms of redeposit under its §404 permitting authority. We hold only that by asserting jurisdiction over "*any* redeposit," including incidental fallback, the *Tulloch* Rule outruns the Corps's statutory authority.

Id. at 1405. The court specifically distinguished cases such as *Avoyelles* and *Rybachek* as not involving incidental fallback, but rather redeposits that may be regulated. *Id.* at 1406.

The court of appeals in this case correctly concluded that, "[h]ere, the deep ripping does not involve mere incidental fallback, but constitutes environmental damage sufficient to constitute a regulable redeposit." Pet. App. 8 n.2. The court of appeals' conclusion rests solidly on the district court's factual findings. *Id.* at 6-8, 70, 86-92, 105. The *NMA* court itself specifically recognized that activities such as "plowing, ditch maintenance, and the like" are distinguishable from the release of incidental fallback because they "may produce fallback, but they may also produce actual discharges, i.e., additions of pollutants." *Id.* at 1405. *No court* has suggested that activities such as petitioners' deep ripping, which "totally filled" and "completely obliterated" wetlands (Pet. App. 86-

92), would qualify as "de minimis" redeposits. *NMA*, 145 F.3d at 1403.[21]

C. Petitioners' Earthmoving Equipment Is A "Point Source"

Petitioners contend (Br. 24-27) that the court of appeals erred in holding that "plows" may constitute "point sources" (Br. 24-27). The court of appeals correctly rejected petitioners' characterization of the activity involved here, which reflects a misconception of the relevant facts and the controlling legal principles. Pet. App. 8-9.

Section 502(14) of the Clean Water Act defines a "point source" as "any discernible, confined and discrete conveyance * * * from which pollutants are or may be discharged." 33 U.S.C. 1362(14). The definition effectively distinguishes between pollution discharges that reach waters of the United States from specific, readily identifiable sources that can be practicably controlled through the Clean Water Act's permit processes, and pollution discharges that reach those waters from diffuse sources that cannot be effectively regulated through those permit regimes. Cf. *EPA* v. *California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 204 (1976). Classic examples of a "point source" are set out in Section 502(14) and include, but are "not limited to," any

> pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.

33 U.S.C. 1362(14). The Clean Water Act uses, but does not define, the term "nonpoint source." CWA §§ 208, 319, 33 U.S.C. 1288, 1329. The textbook examples, however, are various forms of runoff, which reach waterbodies by flowing over or percolating through topographical features. See, *e.g.*, Robert Percival et al., *Environmental Regulation* 630 (3d ed. 2000); *Pronsolino* v. *Nastri*, 291 F.3d 1123, 1126 (9th Cir. 2002) ("Nonpoint sources of pollution are non-discrete sources; sediment run-off from timber harvesting, for example, derives from a nonpoint source.").

The deep ripping equipment that petitioners employed—bulldozers or tractors pulling 4-to-7 foot long metal shanks that wrench out soil that is dragged behind the ripper (Pet. App. 3, 35-36, 69-70)—falls squarely within the plain meaning of a "point source." As the district court found, petitioners employed that earthmoving equipment to penetrate, break up, and remove subterranean claypan, moving the disgorged material "both horizontally and vertically" and depositing it in wetlands. *Ibid.*; *id.* at 8-9, 86. That earthmoving equipment is "discernible, confined and discrete," 33 U.S.C. 1362(14), because it is readily identifiable, it occupies a specific physical space, and it is separate, and therefore distinguishable, from other sources of pollutants. It presents none of the definitional difficulties that remove nonpoint sources, such as sediment from timber harvesting or agricultural stormwater runoff, from permitting requirements. The deep ripping equipment is furthermore a "conveyance" from which pollutants are discharged. *Ibid.* It moves earth, rock,

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[21] Undaunted by the lower courts' rejection of their claim that deep ripping involves mere incidental fallback, petitioners now argue before this Court that "[n]ot even 'incidental fallback'" occurred here. Br. 21. Petitioners raise the new argument that deep ripping does not involve incidental fallback on the theory that there is no redeposit if the soil moved by deep ripping "never loses contact with the immediately-surrounding ground." *Ibid.* That argument is foreclosed because the district court made no such finding of continuous contact, and petitioners not only did not present the argument to the court of appeals, but they advanced a contradictory argument. See Appellants' C.A. Br. 4, 23 ("'deep ripping' ranchland to plant deeper-rooted crops (i.e., vineyards and orchards) involves only 'incidental fallback'," "Plowing Ranchland Produces Only 'Incidental Fallback'"). In any event, petitioners' contention is wrong. The question of "contact" is irrelevant. For example, a bulldozer grading a wetland pushes around dirt, and that dirt also maintains contact with the immediately surrounding dirt. But the dirt is still fill material, is still being redeposited, and is still a discharge.

sand, and biological matter "both horizontally and vertically" from upland and subterranean features, thereby filling the wetland. Pet. App. 3, 8-9, 69-70, 86.

The deep ripping equipment at issue here is not meaningfully distinguishable from other types of earthmoving equipment, such as dredges, graders, front-loading bulldozers, and backhoes, that dig up, transport, and deposit fill material. The courts have consistently and uniformly treated such equipment as point sources. See Pet. App. 8-9, 39-40; *Deaton*, 209 F.3d at 333 (sidecasting through the use of a backhoe, front-end loader, and bulldozer); *United States* v. *Akers*, 785 F.2d 814, 817-820 (9th Cir.) (site preparation using a grader, tractor pulling discs, and a ripper), cert. denied, 479 U.S. 828 (1986); *Avoyelles*, 715 F.2d at 922 (landclearing using bulldozers and backhoes); see also *In re Alameda County Assessor's Parcels*, 672 F. Supp. 1278, 1284-1285 (N.D. Cal. 1987)(same); *United States* v. *Larkins*, 657 F. Supp. 76, 78 n.2, 85 (W.D. Ky. 1987) (same).[22]

[22] In their reply brief at the petition stage, petitioners claimed that "[t]he government's statement that *Akers* involved "rippers" is **false**." Pet. Reply Br. 4 (emphasis in original). Petitioners' accusation is incorrect. The district court's decision in *Akers* makes clear that a ripper was used:

> Various sections of the southern wetlands were disced with farm equipment. Prior to the discing, the areas were ripped with a chisel plow (or "ripper") which was used to slice through the soil so that the discing would more effectively pulverize the soil.

United States v. *Akers*, 15 Envtl. L. Rep. (Entl. L. Inst.) 20,243, 20,244 (E.D. Cal. Jan. 11, 1985), aff'd, 785 F.2d 814 (9th Cir.), cert. denied, 479 U.S. 828 (1986). That court issued a preliminary injunction enjoining the defendant's dredge and fill activities, declining his invitation "to look at each of his earth-moving activities individually." *Id.* at 20,245, 20,248. The court of appeals affirmed that injunction. 785 F.2d at 823. Thus, the government correctly characterized the facts in *Akers*. Indeed, the government had informed petitioners of *Akers*' facts in its brief in the court of appeals, quoting the indented language from the district court's decision. See Gov't C.A. Br. 22 n.11.

Petitioners contend that the equipment at issue here is merely a "plow" and that a plow does not qualify as a "point source" because it lacks the "ability to *confine*, *contain*, and *concentrate*, and then to *carry* and *convey*" pollutants "from one discrete location to another." Br. 25 (emphasis in original). But the equipment at issue here is not a yeoman's "plow" that might be pulled by "horses and oxen" (Br. 26-27), but rather powerful industrial earthmoving machinery. Petitioners do not dispute that "*bulldozers* and *backhoes*" or other equipment used for "major earthmoving, excavation, and ditching functions" may constitute point sources. Br. 26. Instead, they would have this Court draw an arbitrary distinction between heavy equipment that moves earth by pushing a "grading blade" or lifting a "bucket," and essentially identical heavy equipment that moves earth by dragging a "deep plow shank[]" from behind. Br. 25-26, 27.

More fundamentally, the test is not whether the operational ripper has the "ability" to "confine, contain and concentrate" pollutants (Br. 25), but rather whether it *is* a "discernible, confined and discrete conveyance" that discharges pollutants into wetlands. See CWA § 502(14), 33 U.S.C. 1362(14). The rippers in this case meet that test. They are not disqualified simply because they do not possess other immaterial characteristics of other point sources that are designed to convey other types of materials—such as gases, liquids, or slurries—through other means.[23]

[23] Petitioners also characterize the longstanding regulatory distinction between discharges from earthmoving equipment and discharges from agricultural runoff as "the height of irrationality." Br. 26. To the contrary, Congress's exclusion of agricultural stormwater runoff and irrigation return flows from the definition of "point source" aptly illustrates the difference Congress discerned between point source discharges that may be regulated through the Clean Water Act's permitting processes, and other pollution discharges that Congress intended to be addressed through other means, such as the Section 208(b) areawide waste treat-

D. Section 404(f) Indicates That Even Ordinary Plowing May Result In The Discharge Of Pollutants

The Clean Water Act's "normal farming" exemption, Section 404(f), demonstrates that even ordinary plowing may result in the "discharge of a pollutant" that is subject to regulation under Section 404. Section 404(f)(1)(A) creates a limited exemption from the Section 404 permitting requirements for "normal farming, silviculture, and ranching activities" including "plowing, seeding, cultivating," and other listed farming activities. 33 U.S.C. 1344(f)(1)(A). If farming activities such as plowing never result in a discharge of a pollutant for purposes of the Clean Water Act, as petitioners assert (Br. 17), there would be no need to create an exemption for them. See *Minnehaha Creek Watershed Dist.* v. *Hoffman*, 597 F.2d 617, 626 (8th Cir. 1979) (A similar exemption for maintenance or emergency reconstruction, set out at Section 404(f)(1)(B), "would be necessary only if such work is generally subject to § 404 permitting requirements.").

Section 404(f)(2)'s specific delineation of conditions under which discharges from normal farming activities may still require a Section 404 permit provides still further proof that Congress understood that those activities could cause discharges of dredged or fill material. 33 U.S.C. 1344(f)(2). If petitioners are correct that farming activities cannot produce discharges, then they could not be recaptured in this manner. Accordingly, Section 404(f)(2) expresses the clear understanding that even "normal" farming activities remain potentially subject to regulation as point source discharges. It follows, a fortiori, that the extraordinarily destructive activity in which petitioners engaged here also is subject to such regulation.

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ment management planning process. See 33 U.S.C. 1288(b)(2)(F); see also CWA § 319, 33 U.S.C. 1329.

Petitioners rely heavily on statements from individual legislators (Br. 36-39) in support of their assertion that Congress did not mean what it said when it indicated that even "normal" farming is potentially subject to regulation. But the best evidence of congressional intent "is the statutory text adopted by both Houses of Congress and submitted to the President. Where that contains a phrase that is unambiguous * * * we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process." *West Virginia Univ. Hosps., Inc.* v. *Casey*, 499 U.S. 83, 98-99 (1991). See, *e.g.*, *United States* v. *Gonzales*, 520 U.S. 1, 8 (1997) ("[w]here there is no ambiguity in the words, there is no room for construction" (quoting *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 95-96 (1820) (Marshall, C.J.)). In any event, the legislative history reinforces what is manifest from the text itself: even normal farming activities can result in regulated discharges. See, *e.g.*, note 4, *supra*.[24]

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[24] There is no merit to petitioners' suggestion that the 1972 Amendments did not reach agricultural discharges. See, *e.g.*, H.R. Rep. No. 95-139, *supra*, at 23 (recognizing, in proposing a precursor of Section 404(f), that "[u]nder the existing section 404 program given its broadest reach, all matters of agricultural and forestry activities could be subject to Federal permit regulation"). Congress enacted Section 404(f), as part of the 1977 Amendments, based on its conclusion that a carefully circumscribed agricultural exemption was warranted. Congress could have adopted language that broadly exempted all farming activities from the definition of a discharge of a pollutant, or from the definition of a point source, as it did in the case of agricultural stormwater discharges and irrigation return flows. But Congress elected not to do so. It could also have phrased the Section 404(f) exemption more broadly, or it could have elected not to include the recapture provision. Indeed, it considered such approaches in crafting the 1977 Amendments. See, *e.g.*, 4 *Leg. His.* 623-624 (proposed Senate bill), 1159-1160 (proposed House bill), 1343 (proposed amendment of Rep. Edgar). But Congress ultimately settled on Section 404(f) as enacted, which limits the normal farming exemption to "narrowly defined activities that cause little or no adverse effects either

II. SECTION 404(f) DOES NOT EXEMPT PETITIONERS' DEEP RIPPING FROM THE SECTION 404 PERMITTING PROCESS

Petitioners contend (Br. 31-46) that their activities fell within the Section 404(f) conditional exemption for normal farming activities. 33 U.S.C. 1344(f). The courts of appeals have uniformly recognized that, to qualify for the conditional exemption, one must demonstrate "that proposed activities both *satisfy* the requirements of Section 404(f)(1) and *avoid* the recapture provision of Section 404(f)(2)." *United States* v. *Brace*, 41 F.3d 117, 124 (3d Cir. 1994), cert. denied, 515 U.S. 1158 (1995); see *Akers*, 785 F.2d at 819; *Avoyelles*, 715 F.2d at 925. The courts of appeals have also uniformly held that Congress intended the courts to apply the normal farming exemption, as well as other exemptions under Section 404(f)(1), as "narrow" exceptions to the generally applicable permitting requirements. *Brace*, 41 F.3d at 124, 125; *Akers*, 785 F.2d at 819; *United States* v. *Huebner*, 752 F.2d 1235, 1240-1241 (7th Cir.), cert. denied, 474 U.S. 817 (1985); *Avoyelles*, 715 F.2d at 925 n.44.

The district court held that the discharges from petitioners' deep ripping required a Section 404 permit for two reasons. First, they did not satisfy the requirements of Section 404(f)(1)(A), 33 U.S.C. 1344(f)(1)(A). Pet. App. 42-47. In particular, the district court held that petitioners' activities did not meet the regulatory description of a "normal" farming activity or the regulatory definition of "plowing." *Ibid.* Second, even if they had, petitioners' activities were recaptured under Section 404(f)(2), because it was undisputed that petitioners sought to convert use of the area from cattle ranching to vineyard and orchard cultivation and that the deep ripping for that purpose impaired the flow or circulation of

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individually or cumulatively." 3 *Leg. His.* at 474 (Sen. Muskie). See note 4, *supra*.

and reduced the reach of wetlands to the point that they ceased to exist. *Id.* at 47-49. The court of appeals found it unnecessary to reach the question whether petitioners engaged in normal farming within the meaning of Section 404(1)(1)(A), concluding that their activities clearly fell within the recapture provision of Section 404(f)(2). See *id.* at 9-10.

A. Petitioners' Deep Ripping Did Not Satisfy The Requirements Of Section 404(f)(1)

Congress has charged EPA and the Corps with responsibility for implementing the Clean Water Act, including the Section 404 permitting program. See CWA § 101(d), 33 U.S.C. 1251(d). Congress has also granted the Corps, implicitly, and EPA, explicitly, the power to issue regulations for administering the Act's provisions. See CWA §§ 404, 501(a), 33 U.S.C. 1344, 1361(a). In accordance with Congress's expectations, those agencies have issued regulations, after notice and comment, delineating the scope of the exemption for "normal" farming. CWA § 404(f), 33 U.S.C. 1344(f).[25]

The regulations provide that, to qualify as "normal" farming, the activity "must be part of an established (i.e., ongoing) farming * * * operation. * * * An operation ceases to be established when the area on which it was conducted has been converted to another use or has lain idle so long

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[25] Petitioners assert that Congress has defined the scope of "normal" farming. Br. 32, n.20. Congress, however, has not provided definitions of Section 404(f)'s operative terms, such as "normal" or "plowing." Instead, Congress recognized that the scope of any farming exemption "must be defined in regulations." 4 *Leg. His.* 709 (S. Rep. No. 95-370, *supra*, at 76). Petitioners also make much of the Corps' regulations from 1975 and July 1977 (Br. 5-6), before Congress enacted the 1977 Amendments in December 1977. But Congress did not adopt the Corps' prior approach to regulating agricultural activities when it adopted Section 404(f). The Corps recognized that fact and proposed new regulations, 45 Fed. Reg. 62,732 (1980), which were later promulgated in final form, 51 Fed. Reg. 41,232 (1986), long before the events at issue here.

that modifications to the hydrological regime are necessary to resume operation." 33 C.F.R. 323.4(a)(1)(ii); see 40 C.F.R. 232.3(c)(1)(ii). The courts of appeals have long recognized and applied the agency's interpretation. See *Brace*, 41 F.3d at 124- 125; *Akers*, 785 F.2d at 819.[26]

The question, accordingly, is whether petitioners' activities "were within the meaning of the statutory term 'normal farming activities' as defined by the regulations." Pet. App. 45 (quoting *Brace*, 41 F.3d at 127). The district court correctly concluded that they were not. Prior to petitioners' purchase of Borden Ranch in 1993, there was no ongoing farming operation on the areas at issue in this case. See pp. 11-12 & n.8, *supra*. Rather, Borden Ranch had "primarily been used as rangeland for the grazing of cattle." Pet. App. 44. Although portions of Borden Ranch not at issue here had previously been used "for the production of wheat, beets, tomatoes, beans, and corn since approximately 1940, upland crop production has not occurred on a regular basis." *Ibid.* Indeed, petitioners admitted that the land at issue "must be deep ripped and disked before it will be suitable for planting vineyards and orchards." *Ibid.* As the district court observed:

> In other words, even if the subject wetlands and other waters on Borden Ranch were previously farmed, "modifications to the hydrological regime are necessary" to enable [petitioners] to now plant orchards and vineyards. This evinces that [petitioners'] activities are not part of an established farming operation.

[26] The interpretation of EPA and the Corps coincides with the ordinary meaning of "normal." See *Webster's Third New International Dictionary* 1540 (1993) (defining "normal," in its most relevant sense, as "according to, constituting, or not deviating from an established norm, rule, or principle: conformed to a type, standard; regular"). That long-standing regulatory interpretation is, of course, entitled to deference. See *Riverside Bayview Homes*, 474 U.S. at 131; *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984); Pet. App. 45.

Id. at 45 (quoting 33 C.F.R. 323.4(a)(1)(ii); 40 C.F.R. 232.3(c)(1)(ii)(B)).[27]

Furthermore, petitioners' deep ripping also fails to satisfy the Section 404(f)(1)(A) exemption because it did not constitute "plowing" as that term is defined in the Corps and EPA regulations:

> *Plowing* means all forms of primary tillage, including moldboard, chisel, or wide blade plowing, discing, harrowing and similar physical means utilized on farm, forest or ranch land for the breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops. *The term does not include the redistribution of soil, rock, sand, or other surficial materials in a manner which changes any area of the waters of the United States to dry land.* For example, the redistribution of surface materials by blading, grading, or other means to fill in wetland areas is not plowing. * * * Plowing as described above will never involve a discharge of dredged or fill material.

33 C.F.R. 323.4(a)(1)(iii)(D) (emphasis added); see 40 C.F.R. 232.3(d)(4) (same).[28]

Petitioners and their amici generally elide the emphasized language when quoting the provision. See Br. 4, 18, 42; Am. Farm Bur. Fed'n Br. 18; Cal. Farm Bur. Fed'n Br. 22 n.31.

[27] Significantly, petitioners themselves submitted a declaration from the prior owners of Borden Ranch stating that, aside from approximately 1200 acres of "bottom ground" along Dry Creek, which is not at issue here, "[t]he balance of the land was used as rangeland to graze cattle" in the 50-plus years they owned the property before Tsakopoulos purchased it. SER 76.

[28] The regulatory definition of "plowing" applies, of course, to the use of that term in other related regulatory provisions. For example, the Corps' definition of "discharge of fill material" states, among other things, that "[t]he term does not include plowing, cultivating, seeding and harvesting for the production of food, fiber and forest products (See § 323.4 for the definition of these terms)." 33 C.F.R. 323.2(f).

The emphasized passage, however, has central relevance to this case. The district court expressly found that petitioners' deep ripping—even if euphemistically characterized as mere "plowing"—redistributed "earth, rock, sand, and biological matter," Pet. App. 70, converting waters of the United States into dry land, *id.* at 86-92, 106. Although petitioners and their amici imply that deep ripping is an innocuous activity, it can completely destroy wetlands, and it did so in this case. *Ibid.*[29]

The court of appeals affirmed the district court's findings, Pet. App. 11-12, and those findings should not be open to further dispute here. *E.g.*, *Ceccolini*, 435 U.S. at 273; *Graver Tank*, 336 U.S. at 275. Thus, petitioners' activities fall outside of the regulatory definition of "plowing" and outside of the Section 404(f)(1)(A) exemption.[30]

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[29] Indeed, petitioners submitted a declaration below stating that, before development of machinery powerful enough to pull the rippers through the earth at the requisite depth, ER 453, "some areas were blasted to remove the hardpan in order for deep rooted crops to be grown." Cook Decl. ¶ 5(b).

[30] Petitioners contend (Br. 6, 43) that the Corps adopted a broader definition of "plowing" through a Regulatory Guidance Letter (RGL) dated February 11, 1986, that they have lodged with the Clerk of the Court. See Add., *infra*, 12a-13a. But the RGL, which explicitly states that "[n]ot all activities involving the use of a plow, disc, or similar equipment will satisfy the definition of plowing," reiterates the definition of "plowing" set forth in 33 C.F.R. 323.4(a)(1)(iii)(D). Add., *infra*, 12a. At the same time, petitioners attack (Br. 10-11, 44) a joint Corps and EPA "Memorandum To The Field," dated December 12, 1996, which specifically discussed the applicability of Section 404(f) to deep ripping. Add., *infra*, 14a-21a. The Memorandum advised agency field personnel on the agencies' application of Section 404(f) to deep ripping activities, tracking Section 404(f) and the agencies' regulations. *Ibid.* The agencies properly issue such memoranda to provide guidance to their field personnel about the application of pertinent regulations to recurring factual situations. As petitioners acknowledge (Br. 44 n.25), the interpretations articulated therein are entitled to the Court's respect to the extent that they have the "power to persuade." *Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000). In this case, the district court had no occasion to rely on the Memorandum. Pet. App. 4 n.1, 30 n.2. It also found that petitioners had notice beginning in 1993—long before the Memorandum issued—that their activities were subject to Section 404's permitting requirements. *Id.* at 71.

B. Petitioners' Deep Ripping Is Subject To The Recapture Provisions Of Section 404(f)(2)

Even if petitioners' deep ripping satisfied the requirements of Section 404(f)(1)(A), that activity would be subject to the "recapture" provisions of Section 404(f)(2). See 33 U.S.C. 1344(f). The recapture provisions require a person to obtain a Section 404 permit if (a) the person engages in a "normal" farming activity "having as its purpose bringing an area of navigable waters into a use to which it was not previously subject," and (b) as a consequence of a resulting discharge of dredged or fill material, "the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced." 33 U.S.C. 1344(f)(2). The court of appeals correctly concluded that those conditions are satisfied here.

The district court found that petitioners "s[ought] to convert use of their land from ranching and grazing cattle to growing vineyards and orchards." Pet. App. 47. Furthermore, petitioners conceded "that the land must be deep ripped and disked before it will be suitable for planting vineyards and orchards." *Id.* at 44. Petitioners quite plainly instituted their deep ripping activities to bring the area, including the wetlands at issue in this case, into a use to which they were not previously subject. Indeed, by the time of trial, some of the wetlands in question had been completely converted to dry land and had already been planted with vineyards. *Id.* at 87-88, 91.[31]

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[31] Petitioners suggest (Br. 10, 19, 33) that the wetlands in question had been used to grow crops before they were deep ripped, but the district court made no such finding, and there is no evidence in the record that crops were grown on those areas or that they had been plowed in any way for at least a half-century before petitioners purchased them. Pet. App. 44; SER 76. The only portions of the Borden Ranch cultivated for crops before petitioners' purchase lie along Dry Creek; they were not deep

The district court also found that petitioners' deep ripping for the purpose of land use conversion resulted in discharges of dredged and fill material that impaired the flow or circulation of the wetlands and reduced their reach, to the point that they have been severely impaired or completely filled. Pet. App. 48, 87-92. The court of appeals agreed, noting that petitioners had "radically altered the hydrological regime of the protected wetlands." *Id.* at 10. Accordingly, both courts correctly concluded "that the deep ripping at issue in this case is governed by the recapture provision" and therefore subject to Section 404's permitting requirements. *Ibid.*; see *id.* at 47-49.

Petitioners principally argue that Section 404(f)(2) applies only if the farming activity in question is "merely 'incidental' to some other activity whose purpose is to convert waters to an upland use to which they were not previously subject." Br. 19; see Br. 33. But that is not what Section 404(f)(2) says. Section 404(f)(2) addresses "discharge[s] of dredged or fill material" that are "incidental" to the "activity" in question. That "activity" is, of course, the "normal farming * * * activit[y]" that would otherwise be exempt from the permitting requirement. See *Commissioner* v. *Lundy*, 516 U.S. 235, 250 (1996) (invoking the statutory canon that "identical words used in different parts of the same act are intended to have the same meaning"). Petitioners' argument (which they did not raise in the court of appeals) ignores the plain terms of the statute. Section 404(f) says nothing about recapturing a "normal" farming activity only when it is "incidental" to some other unidentified activity that produces still greater harm. Moreover, petitioners ignore that Section

ripped and are not at issue here. See notes 8 & 27, *supra*. Instead, the area in question was used primarily as rangeland for grazing cattle. Pet. App. 44. Furthermore, the district court did not find, and nothing in the record would support an assertion, that cattle grazing continued in those areas after they were converted to vineyards.

404(f)(1), which creates the exemption for normal farming activity, begins with the phrase "Except as provided in paragraph (2) of this subsection" (33 U.S.C. 1344(f)(1)), thus reinforcing that Section 404(f)(2)'s exception to the exemption does indeed apply to normal farming activity, contrary to the thrust of petitioners' argument.[32]

Petitioners characterize the court of appeals as having ruled that Section 404(f)(2)'s recapture provision would apply to any alteration of the hydrology of a wetland. Br. 19, 35. That is not so. The court of appeals and the district court each reached their conclusion based on an application of Section 404(f)(2)'s specific requirements to the facts of this case. They did not suggest, as petitioners and their amici contend, that "*any* change in agricultural crop or practice—even plowing crop land to lie fallow—would bring any kind of plowing within federal regulation." Br. 35; see Am. Farm Bur. Fed'n Br. 10; Ca. Farm Bur. Fed'n Br. 16. To the contrary, the court of appeals explicitly stated that Section 404(f)(2) would not recapture the activities of a

[32] In yet another new argument, petitioners suggest that the recapture provision should apply only if the wetland at issue is brought "into a use to which it was not previously subject" (33 U.S.C. 1344(f)(2)) in the sense that the wetland was not "capable of or amenable to" the new use "in its natural condition." Br. 34. In other words, Section 404(f)(2) would allow the filling of a wetland if the wetland had not been, but could have been, put to the new use without being filled. See *ibid.* There is no reason to think, however, that Congress intended to allow filling of wetlands so long as the wetlands did not need to be filled. See 3 *Leg. His.* 474 (statement of Sen. Muskie). Neither the Corps nor EPA, or any court, has endorsed the counter-intuitive notion that wetlands may be destroyed so long as the destruction is gratuitous. In any event, petitioners have already admitted that the area in question in this case was not suitable for planting vineyards and orchards "in its natural condition" (Br. 34) without deep ripping and its concomitant conversion of wetlands to dry land. See Pet. App. 44-45, 48. The argument, therefore, appears to be merely a variant, in a new guise, of petitioners' contention that deep ripping does not result in the "addition" of pollutants to the filled wetlands. See pages 25-32, *supra* (responding to that contention).

farmer seeking to change from one wetland crop to another. Pet. App. 10.

Petitioners' related claim (Br. 35-36) that the lower courts' ruling would preclude plowing historically ranched land for the first time to improve the forage or to plant crops is also incorrect. The agencies' regulations allow many types of agricultural activity, including "plowing" as that term is defined in the agencies regulations. See 33 C.F.R. 323.4(a)(1)(iii)(D); 40 C.F.R. 232.3(d)(4). In this case, however, petitioners engaged in deep ripping that changed the use of wetlands and incontrovertibly converted them to dry land. The courts below correctly concluded that Section 404(f)(2) does not allow *that* activity without a permit.[33]

The lower court rulings in this case reflect long settled law. The courts of appeals have consistently held that converting from one type of use to another—*e.g.*, from pasturing of cattle and horses to cropping operations, from silviculture to soybean production, or from wetlands farming to dryland farming—can subject the activities in question to recapture under Section 404(f)(2) if those activities result in significant changes to the hydrology of protected waters. See *Brace*, 41 F.3d at 129 (wetlands to dryland farming); *Akers*, 785 F.2d at 822-823 (same); *Huebner*, 752 F.2d at 1240 (cranberries to barley, corn and other dryland crops); *Avoyelles*, 715 F.2d at 925 (forest to soybean production). Those decisions demonstrate that the courts have followed an intensely factual, case-by-case approach in determining the application of Section 404(f)(2). The lower courts here followed that approach and correctly recognized, consistent with the statute and

[33] Petitioners also claim, based on provisions in the Food Security Act of 1985, that "plowing" is not a wetland conversion activity. Br. 34 n.21. Petitioners, however, have previously acknowledged below that the Food Security Act is not applicable here. ER 431 n.14. Even if that Act were otherwise applicable, petitioners' deep ripping falls under 16 U.S.C. 3822(b)(1)(D), because it "destroy[ed] a natural wetland characteristic."

settled law, that the deep ripping that occurred here was not exempt from Section 404's permitting requirements.

III. THE LOWER COURTS CORRECTLY CALCULATED THE MAXIMUM CIVIL PENALTY

The district court properly determined petitioners' civil penalty for discharging dredged and fill material without a permit in accordance with Section 309(d) of the Clean Water Act, 33 U.S.C. 1319(d), which provides that the maximum civil penalty shall be calculated by multiplying the maximum penalty amount for each violation by the number of individual violations. See Pet. App. 16, 102-104. The court of appeals affirmed the district court's "careful analysis of the penalty issue on the facts of this case," noting that the penalty was "significantly lower than the statutory maximum," and remanded only for a determination of "what, if any, reduction in the penalty is appropriate" with regard to the vernal pool withdrawn from the case. *Id.* at 16, 17.

Section 309(d) provides that any person who violates Section 301 of the Clean Water Act "shall be subject to a civil penalty not to exceed $25,000 per day for each violation" and specifies several factors to be considered in determining the ultimate penalty amount. 33 U.S.C. 1319(d). It explicitly recognizes that a single violation—such as a continuous discharge of a pollutant from an outfall—may persist over a long period of time and, in that situation, imposes a penalty of $25,000 per day. In this case, the district court noted that "[t]he parties apparently agree that each pass [of a ripper] constitutes a separate violation," Pet. App. 103, and it accordingly counted the number of times a deep ripper passed through protected waters and multiplied that number by $25,000, arriving at a maximum statutory penalty of $8,950,000. *Id.* at 103-104. That court also stated that "the day on which a discharge occurred is the only day that will be counted in determining the maximum penalty." *Id.* at 102-103. It then analyzed the factors identified in Section

309(d) and reduced that amount to $1.5 million, giving petitioner Tsakopoulos the option, which he ultimately chose, to reduce the penalty even further to $500,000, provided that he agree to undertake restoration of four acres of wetlands. See *id.* at 104-118, 129.

In the court of appeals, petitioners did not challenge the district court's determination that each pass of a deep ripper through a protected wetland constituted a separate violation. Rather, they contended that Section 309(d) provides a maximum daily penalty amount, regardless of the number of violations that occur on each day. See Appellants' C.A. Br. 57 ("This statute contemplates maximum penalties will be calculated not in terms of the total number of individual violations of the same type, but, rather, in terms of *daily violation units.*"); Gov't C.A. Br. 51. The court of appeals correctly rejected that argument. Pet. App. 13-16. Contrary to petitioners' contentions (Br. 46-50), Section 309(d) states that a maximum penalty of $25,000 shall be imposed "per day for each violation," 33 U.S.C. 1319(d)—not "per day for each category of violation" or "per daily violation unit." As the court of appeals observed, "[t]he focus is clearly on *each* violation, and courts have consistently rejected attempts to limit civil penalties to the number of days in which violations occur." Pet. App. 13.

Indeed, Congress specifically resolved this question in the 1987 Amendments. See Pub. L. No. 100-4, § 313(b)(1), 101 Stat. 45; p. 8, *supra.* Prior to February 3, 1987, Section 309(d) stated that violators "shall be subject to a civil penalty not to exceed $10,000 per day of such violation." Some courts took the view that this language required a cap on total penalties of $10,000 per day. In response, Congress amended Section 309(d) to its current form, not only to increase the daily maximum, but "to clarify that each distinct violation is subject to a separate daily penalty assessment of up to $25,000." H.R. Rep. No. 99-1004, at 132 (1986). Petitioners' interpretation would put in place the erroneous interpretation that Congress rejected and would effectively remove "for each violation" from the statutory text.

As the Eleventh Circuit correctly stated in *Atlantic States Legal Found., Inc.* v. *Tyson Foods, Inc.*, 897 F.2d 1128 (1990), "there is no daily cap of $25,000," and "*each* excessive discharge of a pollutant on a given day will subject the polluter to a $25,000 maximum fine." *Id.* at 1139. The court of appeals correctly followed that approach here. As that court recognized, if petitioners' contrary approach were adopted, a defendant who committed multiple violations on a single day would be subject to the same maximum penalty as someone who committed only a single violation. Pet. App. 13. See *United States* v. *Smithfield Foods, Inc.*, 191 F.3d 516, 527-528 (4th Cir. 1999) (noting that the construction petitioners propose here would create a "strong disincentive" to discontinue violations), cert. denied, 531 U.S. 813 (2000).

Petitioners' reliance (Br. 47-48) on *Chesapeake Bay Found., Inc.* v. *Gwaltney of Smithfield, Ltd.*, 791 F.2d 304 (4th Cir. 1986), is misplaced. This Court vacated that decision, 484 U.S. 49 (1987), and, in any event, it discusses a version of Section 309(d) that is no longer in force. The statutory provision at issue here—imposing a penalty of "$25,000 per day for each violation"—did not come into effect until 1987. *Tyson Foods*, 897 F.2d at 1138-1139. Moreover, the court in *Chesapeake Bay Foundation* explicitly declined to reach the question presented in this case. See Pet. App. 13-14.[34]

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[34] Petitioners also invoke the rule of lenity (Br. 49) in support of their interpretation of Section 309(d), which is a statutory provision that, on its face, can have only civil application. This Court has never applied the rule of lenity to that situation. See *Babbitt* v. *Sweet Home Chapter of Communities*, 515 U.S. 687, 704 n.18 (1995). Moreover, even in the criminal context, the "mere possibility of articulating a narrower

Contrary to petitioners' contention (Br. 49-50), the court of appeals identified a "logical stopping point" for determining the maximum civil penalty. It is the number of violations multiplied by the maximum penalty that can be assessed for each violation. In any event, the maximum civil penalty is only a benchmark. The district courts have discretion to impose a civil penalty that is less than the statutory ceiling, based upon the various factors set forth in Section 309(d). See *Tull* v. *United States*, 481 U.S. 412, 427 (1987) (Clean Water Act penalties are "highly discretionary"). The district court acted well within its discretion in this case.[35]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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construction * * * does not by itself make the rule of lenity applicable." *Smith* v. *United States*, 508 U.S. 223, 239 (1993).

[35] Indeed, even if petitioners' theory of calculating the maximum penalty were accepted, the evidence in the record would support a penalty of at least $1,825,000 (73 days of ripping multiplied by $25,000), well above the $500,000 penalty that petitioner Tsakopoulos was ultimately assessed. SER 30, 33-67, 260-275 (invoices and time records of David T. Price, Inc., deep ripping operator).

ADDENDUM

A. Pertinent Provisions of the Clean Water Act

Section 301, 33 U.S.C. 1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

* * * * *

Section 309, 33 U.S.C. 1319. Enforcement

* * * * *

(d) Civil penalties; factors considered in determining amount

Any person who violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator, or by a State,,[1] or in a permit issued under section 1344 of this title by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit

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[1] So in original.

(if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

* * * * *

Section 404, 33 U.S.C. 1344. Permits for dredged or fill material

(a) Discharge into navigable waters at specified disposal sites

The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

* * * * *

(f) Non-prohibited discharge of dredged or fill material

(1) Except as provided in paragraph (2) of this subsection, the discharge of dredged or fill material–

(A) from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices;

(B) for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures;

(C) for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches;

(D) for the purpose of construction of temporary sedimentation basins on a construction site which does not include placement of fill material into the navigable waters;

(E) for the purpose of construction or maintenance of farm roads or forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained, in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized;

(F) resulting from any activity with respect to which a State has an approved program under section 1288(b)(4) of this title which meets the requirements of subparagraphs (B) and (C) of such section,

is not prohibited by or otherwise subject to regulation under this section or section 1311(a) or 1342 of this title (except for effluent standards or prohibitions under section 1317 of this title).

(2) Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

* * * * *

Section 502, 33 U.S.C. 1362. Definitions

Except as otherwise specifically provided, when used in this chapter:

* * * * *

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces" within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

* * * * *

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

* * * * *

(14) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

* * * * *

(16) The term "discharge" when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.

* * * * *

B. Pertinent Regulations of the Army Corps of Engineers

33 C.F.R. 323.2 Definitions.

* * * * *

(c) The term *dredged material* means material that is excavated or dredged from waters of the United States.

* * * * *

33 C.F.R. 323.2 Definitions. [1994]

* * * * *

(d)(1) Except as provided below in paragraph (d)(2), the term *discharge of dredged material* means any addition of dredged material into, including any redeposit of dredged material within, the waters of the United States. The term includes, but is not limited to, the following:

* * * * *

(iii) any addition, including any redeposit, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation.

* * * * *

(e) The term *fill material* means any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of an waterbody. The term does not include any pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under section 402 of the Clean Water Act. See § 323.3(c) concerning the regulation of the placement of pilings in waters of the United States.

(f) The term *discharge of fill material* means the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: Placement of fill that is necessary for the construction of any structure in a water of the United States; the building of any structure or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, and other uses; causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and subaqueous utility lines; and artificial reefs. The term does not include plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products (See § 323.4 for the definition of these terms). See § 323.3(c) concerning the regulation of the placement of pilings in waters of the United States.

33 C.F.R. 323.4 Discharges not requiring permits.

(a) *General.* Except as specified in paragraphs (b) and (c) of this section, any discharge of dredged or fill material that may result from any of the following activities is not prohibited by or otherwise subject to regulation under section 404:

(1)(i) Normal farming, silviculture and ranching activities such as plowing, seeding, cultivating, minor drainage, and harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices, as defined in paragraph (a)(1)(iii) of this section.

(ii) To fall under this exemption, the activities specified in paragraph (a)(1)(i) of this section must be part of an

established (i.e., on-going) farming, silviculture, or ranching operation and must be in accordance with definitions in § 323.4(a)(1)(iii). Activities on areas lying fallow as part of a conventional rotational cycle are part of an established operation. Activities which bring an area into farming, silviculture, or ranching use are not part of an established operation. An operation ceases to be established when the area on which it was conducted has been coverted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operations. If an activity takes place outside the waters of the United States, or if it does not involve a discharge, it does not need a section 404 permit, whether or not it is part of an established farming, silviculture, or ranching operation.

(iii) * * * *

(D) Plowing means all forms of primary tillage, including moldboard, chisel, or wide-blade plowing, discing, harrowing and similar physical means utilized on farm, forest or ranch land for the breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops. The term does not include the redistribution of soil, rock, sand, or other surficial materials in a manner which changes any area of the waters of the United States to dry land. For example, the redistribution of surface materials by blading, grading, or other means to fill in wetland areas is not plowing. Rock crushing activities which result in the loss of natural drainage characteristics, the reduction of water storage and recharge capabilities, or the overburden of natural water filtration capacities do not constitute plowing. Plowing as described above will never involve a discharge of dredged or fill material.

C. Pertinent Regulations of the Environmental Protection Agency

40 C.F.R. 232.2 Definitions. [1994]

* * * * *

Discharge of dredged material. (1) Except as provided below in paragraph (2), the term *discharge of dredged material* means any addition of dredged material into, including any redeposit of dredged material within, the waters of the United States. The term includes, but is not limited to, the following:

* * * * *

(iii) Any addition, including any redeposit, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation.

* * * * *

Discharge of fill material. (1) The term *discharge of fill material* means the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: Placement of fill that is necessary for the construction of any structure in a water of the United States; the building of any structure or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, and other uses; causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for structures such as sewage treatment facilities,

intake and outfall pipes associated with power plants and subaqueous utility lines; and artificial reefs.

* * * * *

Dredged material means material that is excavated or dredged from waters of the United States.

* * * * *

Fill material means any "pollutant" which replaces portions of the "waters of the United States" with dry land or which changes the bottom elevation of a water body for any purpose.

40 C.F.R. 232.3 Activities not requiring permits.

* * * * *

(c) The following activities are exempt from section 404 permit requirements, except as specified in paragraphs (a) and (b) of this section:

(1)(i) Normal farming, silviculture and ranching activities such as plowing, seeding, cultivating, minor drainage, and harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices, as defined in paragraph (d) of this section.

(ii)(A) To fall under this exemption, the activities specified in paragraph (c)(1) of this section must be part of an established (i.e., ongoing) farming, silviculture, or ranching operation, and must be in accordance with definitions in paragraph (d) of this section. Activities on areas lying fallow as part of a conventional rotational cycle are part of an established operation.

(B) Activities which bring an area into farming, silviculture or ranching use are not part of an established operation. An operation ceases to be established when the area in

which it was conducted has been converted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operation. If an activity takes place outside the waters of the United States, or if it does not involve a discharge, it does not need a section 404 permit whether or not it was part of an established farming, silviculture or ranching operation.

* * * * *

(d) For purpose of paragraph (c)(1) of this section, cultivating, harvesting, minor drainage, plowing, and seeding are defined as follows:

* * * * *

(4) Plowing means all forms of primary tillage, including moldboard, chisel, or wide-blade plowing, discing, harrowing, and similar physical means used on farm, forest or ranch land for the breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops. Plowing does not include the redistribution of soil, rock, sand, or other surficial materials in a manner which changes any area of the waters of the United States to dryland. For example, the redistribution of surface materials by blading, grading, or other means to fill in wetland areas is not plowing. Rock crushing activities which result in the loss of natural drainage characteristics, the reduction of water storage and recharge capabilities, or the overburden of natural water filtration capacities do not constitute plowing. Plowing, as described above, will never involve a discharge of dredged or fill material.

D. 1986 Regulatory Guidance Letter

Regulatory Guidance Letter 86-01

SUBJECT: Exemptions to CWA-Plowing

DATE: February 11, 1986 [LOGO]

EXPIRES: December 31, 1988

1. The purpose of this guidance is to clarify the applicability of Section 404 to plowing.

2. Since 1975, Corps regulations have excluded "plowing . . . for production of food, fiber, and forest products" from the definition of a discharge of dredged or fill material (33 CFR 323.2(j) and (1)). "Plowing" is defined in 33 CFR 323.4(a)(1)(iii)(D).

3. Plowing for the purpose of producing food, fiber, and forest products and meeting the definition in Section 323.4 will never involve a discharge of dredged or fill material. Such plowing is not subject to any of the provisions of Section 404 including the Section 404(f) exemption limitations. Section 404(f) is applicable to those activities that do involve a discharge but are statutorily exempted from the need to obtain a 404 permit.

4. Not all activities involving the use of a plow, disc, or similar equipment will satisfy the definition of plowing. For example, using a plow to dry the surface of a peat bcg to facilitate mining is not plowing since it is not for the purpose of producing food, fiber or forest products. Also, the use of a plow to divert a braided stream feeding a wetland is not plowing because the purpose is to change a water of the United States to dry land. Thus, these activities are regulated under Section 404 if they occur in a water of the United States.

5. This guidance expires 31 December 1988 unless sooner revised or rescinded.

FOR THE CHIEF OF ENGINEERS:

E. 1996 Memorandum To The Field

[SEAL] **Department of the Army** [LOGO]
U.S. Army Corps of Engineers

United States Environmental Protection Agency

12 DEC 1996

MEMORANDUM TO THE FIELD

SUBJECT: Applicability of Exemptions under Section 404(f) to "Deep-Ripping" Activities in Wetlands

PURPOSE: The purpose of this memorandum is to clarify the applicability of exemptions provided under Section 404(f) of the Clean Water Act (CWA) to discharges associated with "deep-ripping" and related activities in wetlands.[1]

BACKGROUND:

1. Section 404(f)(1) of the CWA exempts from the permit requirement certain discharges associated with normal farming, forestry, and ranching practices in waters of the United States, including wetlands. Discharges into waters subject to the Act associated with farming, forestry, and ranching practices identified under Section 404(f)(1) do not require a permit except as provided under Section 404(f)(2).

2. Section 404(f)(1) does not provide a total, automatic exemption for all activities related to agricultural, silvicultural, or ranching practices. Rather, Section 404(f)(1) exempts only those activities specifically identified in paragraphs (A) through (F), and "other activities of essentially the same character as named" [44 FR 34264]. For example, Section

[1] As this guidance addresses primarily agricultural-related activities, characterizations of such practices have been developed in consultation with experts at the U.S. Department of Agriculture (USDA), Natural Resources Conservation Service.

404(f)(1)(A) lists discharges of dredged or fill material from "normal farming, silviculture, and ranching activities, such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices."

3. Section 404(f)(1)(A) is limited to activities that are part of an "established (i.e., ongoing) farming, silviculture, or ranching operation." This "established" requirement is intended to reconcile the dual intent reflected in the legislative history that although Section 404 should not unnecessarily restrict farming, forestry, or ranching from continuing at a particular site, discharge activities which could destroy wetlands or other waters should be subject to regulation.

4. EPA and Corps regulations [40 CFR 230 and 33 CFR 320] and preamble define in some detail the specific "normal" activities listed in Section 404(f)(1) (A). Three points may be useful in the current context:

a. As explained in the preamble to the 1979 proposed regulations, the words "such as" have been consistently interpreted as restricting the section "to the activities *named* in the statute and other activities of essentially the same character as named," and "preclude the extension of the exemption . . . to activities that are unlike those named." [44 FR 34264].

b. Plowing is specifically defined in the regulations *not* to include the redistribution of surface material in a manner which converts wetlands areas to uplands [See 40 CFR 233.35(a)(1)(iii)(D)].

c. Discharges associated with activities that establish an agricultural operation in wetlands where previously ranching had been conducted, represents a "change in use" within the meaning of Section 404(f)(2). Similarly,

discharges that establish forestry practices in wetlands historically subject to agriculture also represent a change in use of the site [See 40 CFR 233.35(c)].

5. The statute includes a provision at Section 404(f)(2) that "recaptures" or reestablishes the permit requirement for those otherwise exempt discharges which:

a. convert an area of the waters of the U.S. to a new use, *and*

b. impair the flow or circulation of waters of the U.S. *or* reduce the reach of waters of the U.S.

Conversion of an area of waters of the U.S. to uplands triggers both provisions (a) and (b) above. Thus, at a minimum, any otherwise exempt discharge that results in the conversion of waters of the U.S. to upland is recaptured under Section 404(f)(2) and requires a permit. It should be noted that in order to trigger the recapture provisions of Section 404(f)(2), the discharges themselves need not be the sole cause of the destruction of the wetland or other change in use or sole cause of the reduction or impairment of reach, flow, or circulation of waters of the U.S. Rather, the discharges need only be "incidental to" or "part of" an activity which is intended to or will forseeably bring about that result. Thus, in applying Section 404(f)(2), one must consider discharges in context, rather than isolation.

ISSUE:

1. Questions have been raised involving "deep-ripping" and related activities in wetlands and whether discharges associated with these actions fall within the exemptions at Section 404(f)(1)(A). In addition, the issue has been raised whether, if such activities fall within the exemption, they would be recaptured under Section 404(f)(2).

2. "Deep-ripping" is defined as the mechanical manipulation of the soil to break up or pierce highly compacted, impermeable or slowly permeable subsurface soil layers, or other similar kinds of restrictive soil layers. These practices are typically used to break up these subsoil layers (e.g., impermeable soil layer, hardpan) as part of the initial preparation of the soil to establish an agricultural or silvicultural operation. Deep-ripping and related activities are also used in established farming operations to break up highly compacted soil. Although deep-ripping and related activities may be required more than once, the activity is typically not an annual practice. Deep-ripping and related activities are undertaken to improve site drainage and facilitate deep root growth, and often occur to depths greater than 16 inches and, in some cases, exceeding 4 feet below the surface. As such, it requires the use of heavy equipment, including bulldozers, equipped with ripper-blades, shanks, or chisels often several feet in length. Deep-ripping and related activities involve extending the blades to appropriate depths and dragging them through the soil to break up the restrictive layer.

3. Conversely, plowing is defined in EPA and Corps regulations [40 CFR 230 and 33 CFR 320] as "all forms of primary tillage . . . used . . . for the breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops" [40 CFR 232.3(d)(4)]. As a general matter, normal plowing activities involve the annual, or at least regular, preparation of soil prior to seeding or other planting activities. According to USDA, plowing generally involves the use of a blade, chisel, or series of blades, chisels, or discs, usually 8-10 inches in length, pulled behind a farm vehicle to prepare the soil for the planting of annual crops or to support an ongoing farming practice. Plowing is commonly used to

break up the surface of the soil to maintain soil tilth and to facilitate infiltration throughout the upper root zone.

DISCUSSION:

1. Plowing in wetlands is exempt from regulation consistent with the following circumstances:

a. it is conducted as part of an ongoing, established agricultural, silvicultural or ranching operation; and

b. the activity is consistent with the definition of plowing in EPA and Corps regulations [40 CFR 230 and 33 CFR 320]; and

c. the plowing is not incidental to an activity that results in the immediate or gradual conversion of wetlands to non-waters.

2. Deep-ripping and related activities are distinguishable from plowing and similar practices (e.g., discing, harrowing) with regard to the purposes and circumstances under which it is conducted, the nature of the equipment that is used, and its effect, including in particular the impacts to the hydrology of the site.

a. Deep-ripping and related activities are commonly conducted to depths exceeding 16 inches, and as deep as 6-8 feet below the soil surface to break restrictive soil layers and improve water drainage at sites that have not supported deeper rooting crops. Plowing depths, according to USDA, rarely exceed one foot into the soil and not deeper than 16 inches without the use of special equipment involving special circumstances. As such, deep-ripping and related activities typically involve the use of specialized equipment, including heavy mechanized equipment and bulldozers, equipped with elongated ripping blades, shanks, or chisels often several feet in length. Moreover, while plowing is generally associated

with ongoing operations, deep-ripping and related activities are typically conducted to prepare a site for establishing crops not previously planted at the site. Although deep-ripping may have to be redone at regular intervals in some circumstances to maintain proper soil drainage, the activity is typically not an annual or routine practice.

b. Frequently, deep-ripping and related activities are conducted as a preliminary step for converting a "natural" system or for preparing rangeland for a new use such as farming or silviculture. In those instances, deep ripping and related activities are often required to break up naturally-occurring impermeable or slowly permeable subsurface soil layers to facilitate proper root growth. For example, for certain depressional wetlands types such as vernal pools, the silica-cemented hardpan (durapan) or other restrictive layer traps precipitation and seasonal runoff creating ponding and saturation conditions at the soil surface. The presence of these impermeable or slowly permeable subsoil layers is essential to support the hydrology of the system. Once these layers are disturbed by activities such as deep-ripping, the hydrology of the system is disturbed and the wetland is often destroyed.

c. In contrast, there are other circumstances where activities such as deep-ripping and related activities are a standard practice of an established on-going farming operation. For example, in parts of the Southeast, where there are deep soils having a high clay content, mechanized farming practices can lead to the compaction of the soil below the soil surface. It may be necessary to break up, on a regular although not annual basis, these restrictive layers in order to allow for normal root development and infiltration. Such activities may require

special equipment and can sometimes occur to depths greater than 16 inches. However, because of particular physical conditions, including the presence of a water table at or near the surface for part of the growing season, the activity typically does not have the effect of impairing the hydrology of the system or otherwise altering the wetland characteristics of the site.

CONCLUSION:

1. When deep-ripping and related activities are undertaken as part of an *established, ongoing* agricultural silvicultural, or ranching operation, to break up compacted soil layers *and* where the hydrology of the site will not be altered such that it would result in conversion of waters of the U.S. to upland, such activities are exempt under Section 404(f)(1)(A).

2. Deep-ripping and related activities in wetlands are *not* part of a normal ongoing activity, and therefore *not* exempt, when such practices are conducted in association with efforts to establish for the first time (or when a previously established operation was abandoned) an agricultural, silvicultural or ranching operation. In addition, deep-ripping and related activities are not exempt in circumstances where such practices would trigger the "recapture" provision of Section 404(f)(2):

a) Deep-ripping to establish a farming operation at a site where a ranching or forestry operation was in place is a change in use of such a site. Deep-ripping and related activities that also have the effect of altering or removing the wetland hydrology of the site would trigger Section 404(f)(2) and such ripping would require a permit.

b) Deep-ripping a site that has the effect of converting wetlands to non-waters would also trigger Section 404(f)(2) and such ripping would require a permit.

3. It is the agencies' experience that certain wetland types are particularly vulnerable to hydrological alteration as a result of deep-ripping and related activities. Depressional wetland systems such as prairie potholes, vernal pools and playas whose hydrology is critically dependent upon the presence of an impermeable or slowly permeable subsoil layer are particularly sensitive to disturbance or alteration of this subsoil layer. Based upon this experience, the agencies have concluded that, as a general matter, deep-ripping and similar practices, consistent with the descriptions above, conducted in prairie potholes, vernal pools, playas and similar depressional wetlands destroy the hydrological integrity of these wetlands. In these circumstances deep-ripping in prairie potholes, vernal pools, and playas is recaptured under Section 404(f)(2) and requires a permit under the Clean Water Act.

/s/ ROBERT H. WAYLAND III
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